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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

March Term, 1992

FRANCIS OSEI-AFRIYIE,
Petitioner,

v.

THE MEDICAL COLLEGE OF PENNSYLVANIA, and
TERRENCE LEE STULL, M.D., and
THAD PADUA, M.D.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANCIS OSEI-AFRIYIE
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Pro se Petitioner

QUESTIONS PRESENTED

1. Whether the application of the doctrines of res judicata and collateral estoppel does require an examination of a full and fair opportunity to litigate the issue in the prior action as the Supreme Court, the Third Circuit and the Delaware District court ruled in prior cases.

2. Whether a judgement unaccompanied by findings of fact on particular issues binds any party on those issues; and if not whether the existence of genuine issues of material facts precludes the granting of summary judgement.

3. Whether the Third Circuit's judgement order affirming the lower court's order dismissing the case against Dr. Thad Padua instead of transferring it to another District Court which has jurisdiction over Dr. Padua pursuant to 28 USC § 1406(a) is consistent with the Supreme Court's decision in Goldlawar, Inc. v. Heiman, 369 U.S. 463, 8 L. Ed. 39, 82 S. Ct. 913 (1962).

4. Whether the constitutional rights to due process and jury trial on issues may be lost through lower courts' failure to recognize the importance and consistent application of the Federal Rules of Civ. Proc. and the Fed. Rules of Evidence.

LIST OF PARTIES TO PROCEEDING BELOW

Petitioner certifies that only the following were parties to the proceeding below:

Jennifer Osei-Afriyie
Monica Osei- Afriyie
Francis Osei-Afriyie

The Medical College of Pennsylvania
Terrence Lee Stull, M.D.
Thad Padua, M.D.

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FRANCIS OSEI-AFRIYIE,

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THE MEDICAL COLLEGE OF PENSYLLVANIA

and

TERRENCE LEE STULL, M.D.,

and

THAD PADUA, M.D.

Respondents.

The petitioner Francis Osei-Afriyie respectfully prays that a Writ of Certiorari be issued to review the Judgement Order of the United States Court of Appeals for the Third Circuit, filed in the above-entitled proceeding on December 26, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals (No. 90-1642) has not been reported. It is reprinted in the Appendix (ap.) A3. The Memorandum Opinion of the United States District Court for Eastern District of Pennsylvania (Judge Charles Weiner, Civ. A. No. 90-1566) has not been reported. It is reprinted in ap. B1. The Order of the Delaware District court (Civ. A. No. 90-388) is reprinted in ap. C1.

JURISDICTION

The Judgement Order of the Court of Appeals was filed on December 26, 1991. Petitioner did not file a petition for rehearing. The jurisdiction of this court is invoked under U.S.C. Section 1254(1). This petition is filed within 90 days of the entry of the Opinion of the Court of Appeals (28 U.S.C. § 2101(c).

Jurisdiction of the United States District Court for the District of Delaware was invoked under the provisions of Title 28 U.S.C.§ 1332 and 42 U.S.C.§ 1983. Jurisdiction was also based on 21 U.S.C.§ 355(i) and U.S.C.A. Const. Amend. 1, 5, 9 and 14. The jurisdiction of this Court is invoked under U.S.C. Section 1254(1). The reasons why the provisions of 42 U.S.C. §1983 and 21 U.S.C. § 355(i) were invoked are explained in the statement of the case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT

The First Amendment to the United States Constitution provides:

'' Congress shall make no law respecting and establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition

the Government for a redress of grievances.''

FIFTH AMENDMENT

The Fifth Amendment to the United States

Constitution provides:

'' No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life; liberty , or property, without due process of law; nor shall private property be taken for public use, without just compensation.''

SEVENTH AMENDMENT

The Seventh Amendment to the United

States Constitution provides:

''In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no facts tried by a jury shall be otherwise re-examined in any court of the United States that according to the rules of the common law.''

NINTH AMENDMENT

The Ninth Amendment to the United States Constitution provides:

''The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.''

FOURTEENTH AMENDMENT

The Fourteenth Amendment to the United States Constitution provides:

'' All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge any priviledges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.''

21 U.S.C. § 355(i) provides :

'' The physician/researcher must certify that he will inform any patients or persons used as controls or their representatives that the drugs are being used for investigational purposes, and that he will obtain the consent of the subjects, or their representatives.''

42 U.S.C. § 1983 provides:

'' Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, in equity, or other proper proceeding for redress.''

STATEMENT OF THE CASE

This Court deserves to know the complete and accurate truth in this matter. Because the Centers for Disease Control (CDC) and its agents' involvement with the respondents forms an important part of this Court's jurisdiction, petitioner will address the issue from the record. What follows is the chronology of events:

1. In April 1985, the CDC published an article in the *Morbidity and Mortality Weekly Report* entitled, ''*Intravenous*

Quinidine Gluconate in the Treatment of Severe Plasmodium falciparum Infections'' in which it invited interested physicians throughout the country to participate in a clinical trial. The protocol involved a trial of treating severe malaria patients with continuous infusion of quinidine gluconate under closely monitored conditions in an intensive-care setting. The CDC had filed an Investigational New Drug (IND) notice with the U.S. Food and Drug Administration for the treatment of severe *P. falciparum* malaria with intravenous quinidine gluconate. The agency had hoped that information collected from such patients would corroborate one experience in Thailand and establish quinidine gluconate as a safe and effective antimalarial drug in the United States.(*See* Reply Brief No.

91-3474, appendix (ap.) at 5, paragraphs (para.) 3 & 4). This is a crucial point because, as petitioner will shortly point out, Drs. Stull, Padua and Kirk D. Miller and their colleagues do state in their May 1987 article that they followed this very CDC's protocol in the treatment of petitioner's children. Dr. Kirk D. Miller was a CDC (Malaria Branch) employee at the time of the prospective study (i.e. 1985-1987). In fact, he is still a CDC employee.

2. Respondents accepted the CDC's invitation to participate in the latter's clinical trial with the use of quinidine to treat severe malaria. (*See* unsigned Open Study Consent form, Appendix in this petition (Ap.) at H1; Miller Kirk, D., et al., ''Treatment of Severe Malaria in the United States with Continuous

Infusion of Quinidine Gluconate and Exchange Transfusion,'' *The New England Journal of Medicine*, vol. 321, No. 2, July 13, 1989, p.65, footnote, (para.) 2 and p. 66, col.1, para.2 (hereafter *NEJM, July 13, 1989*); Stull Terrence, L., et al.,''Continuous-Infusion Quinidine Gluconate for Treating Children with Severe *Plasmodium falciparum* Malaria,'' *Journal of Infectious Diseases*, (hereafter called JID), vol.155, No. 5 May 1987, p. 1040, col.2, para.2. **It should be noted that all three articles plus the unsigned consent form are in the reocord in the Third Circuit and in the two lower district courts.**

3. In July 1985, petitioner's children were admitted into respondent, The Medical College of Pensylvania Hospital (MCP) for the treatment of severe

malaria. Dr. Terrence Stull (Dr. Stull) was their attending physician and Dr. Thad Padua (Dr. Padua) was a resident in the pediatric department. Dr. Padua wrote the physician orders for the care of the children.

4. While the children were in the hospital, Dr. Stull sought permission from petitioner to involve his children in the CDC protocol but petitioner denied him permission. (*See*, statement from Mr. Ferrante, respondents' attorney, transcript, 7/16/90, at 18, lines 17-18 and Answer, para. 18. ''It is admitted that the parents of minor-plaintiffs elected not to participate in a CDC protocol relating to the use of quinidine.'' At no time did the parents give the respondents or their agents permission to use quinidine on the

children. In fact, when petitioner became aware that quinidine had been administered to his children he told MCP agents including Drs. Stull and Padua to discontinue the medication and received assurances to that effect.

5. Respondents indeed did use petitioner's children as subjects in the CDC's clinical trial protocol (*See* JID, at 1040, col.2, para. 2 and reference no. 5 made therein. Drs. Stull et. al's reference no. 5 in JID is the CDC's April 1985 article mentioned above) contrary to the assurances petitioner had received. Dr. Stull lied to the CDC that he had obtained the parents' consent to involve the children in the clinical trial. (*See, NEJM*, July 13, 1989, p.66, para.2).

6. Dr. Stull et al. purport to show in their May 1987 JID article that they did

prove what the CDC had set out to prove in the study by concluding on p. 1042 that ''The two cases presented here corroborate the evidence from Thailand that quinidine is an effective alternative to quinine for treating severe *P. falciparum* infections.''

7. The cooperative study conducted by the CDC and or its agents, (including Dr. Kirk D. Miller, a CDC employee) with the respondents was a Federal Drug and Administration (FDA) approved study. Respondents have admitted that ''Representatives of CDC were present at MCP and consulted with Dr. Stull on the care of minor-plaintiffs''*(see, Answer, paras. 25-26)*.

Petitioner wants to emphasize that the FDA does not require clinical investigators to provide or supply the

names of individual subjects. (*See*, Richard C. Thompson, 'Protecting Human Guinea Pigs', *FDA CONSUMER*, Dec. 1986-Jan.1987, p.15). The FDA, however, does require the sponsor of a study to provide a list of the names of the clinical investigators and a summary of their training and experience. (*See*, Ellen Flannery,''Should it be easier or harder to use unapproved drugs and devices?'' *Hastings Center Report*, February 1986, p.19.

8. In light of the above, the respondents willfully participated in a joint activity with the Centers for Disease Control, a federal agency, to deprive petitioner of his Constitutional and statutory rights to decide for his children whether or not they were to take part in the CDC's quinidine clinical

trial (42 U.S.C. § 1983, 28 U.S.C. § 1343, 21 U.S.C. § 355(i), 21 C.F.R. § 50, 45 C.F.R. § 46 and the 1st, 5th, 9th and 14th Amendments to the United States Constitution).

On July 25, 1985, at about 6:30 a.m. petitioner and his wife took their two daughters aged ten months and two and half years to the emergency room of the Medical College of Pennsylvania. After examination, the doctors at the emergency room told the parents that the children's conditions were stable. At about 9:30 a.m. on that day, Dr. Stull approached petitioner and his wife, told them that the children had 25% of their blood invaded by malaria parasites and asked for their permission to admit them for treatment. Petitioner consented to their admissions and treatment. As the May 1987

and the July 13 articles show, the 25% parasitemia levels were manufactured by respondents. In fact, it was a lie.

Although, the diagnosis of the malaria and their admissions into the hospital for the purpose of treating the malaria were made on or about 9:30 a.m. on July 25, 1985, the commencement of malaria 'therapy' did not begin for Jennifer and Monica until 4:30 p.m. and 4:25 p.m. respectively, more than 7 hours after diagnosis. In the interim, Jennifer was taken to the pediatric ward accompanied by petitioner. From about 10:00 a.m. until 3:30 p.m. on July 25, 1985, Jennifer was left in a hospital bed, given toys to play with and totally unattended by hospital staff ('a precarious condition indeed'). Meanwhile, tests were being done on Monica who later

joined her sister on the ward and was soon thereafter transferred to the Pediatric Intensive Care Unit at about 11:30 a.m. At about 3:30 p.m., Jennifer was also taken to the Pediatric Intensive Care Unit for the commencement of malaria 'therapy'.

Petitioner arrived at the hospital the next day about 8:30 a.m. on July 26, 1985, to see his children. What he saw was shocking to the eyes. Jennifer had doubled in size in the upper extremities (i.e. from the waist to the face), vomiting, having diarrhea, very hypersensitive, very irritable and agitated and screaming 'Dadaa, mamaa, carrr, T.vvv) (see Ampofoh's testimony, D.I. 21, Exhibit A, at 21; Pamphlet to Accompany appellant's brief in Court of Appeals' No. 90-1642 (C.A. No. 90-1642)),

at 17-48. Monica was twitching with her fingers up in the air. Petitioner brought the children's deteriorated conditions to the attending nurses and asked them to call the doctor. The children have not recoved from the medical experimentation.

At about 11 a.m. on July 26, 1985, the MCP employees approached petitioner with a different consent form and asked for permission to involve his children in the MCP and the Center for Disease Control's (CDC) cooperative study involving the use of quinidine. *See,* AP. H1. Petitioner refused permission. At that time, approximately 18 hours into the administration of the drug, petitioner became aware that quinidine had been given to his children. He told the MCP employees that his children would not be involved in the CDC protocol and that

they should discontinue the medication. He was assured and believed that the children were not and would not be involved in the CDC quinidine protocol and that the medication would be discontinued immediately.

Quinine, the drug which is used to treat malaria, could have been obtained from the CDC in Atlanta within a maximum of 12 hours. JID, May 1987, at 1040. Hence, quinine could have been delivered to the hospital by 4:30 a.m. on July 26, 1985, given respondents the maximum benefit of doubt.

On the day of the children's discharge from the hospital, Dr. Stull asked petitioner for permission to have the children's medical information published but he was again refused permission. It is again important to mention that

contrary to what the Third Circuit states in its Opinion, Ap.A10, Dr. Stull and his colleagues and the doctors at CDC knew the effects of administering quinine and quinidine together to the same patient. (*See, NEJM, July 13, 1989, p.66, col.2 para.4, under 'Other Therapy'; and JID, May 1987, p.1042, col.1, para.3.* Also, the children's parasite levels were never reduced below 2% while they were hospitalized. (*See* evidence from petitioner's motion to correct misstatements, filed on July 22, 1991 in C.A. No. 90-1642; respondents' motion to strike petitioner's motion to correct misstatements as well as petitioner's response to respondents' motion). It should be noted that the respondents (Dr. Stull and MCP) corrected some of the misstatements in their

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motion. They also admitted some of the misstatements by failing to respond. Lastly, a reading of Dr. Stull's article in JID as well as data on patients numbers 1 & 7 from *NEJM, July 13, 1989, p.67,* should be obvious to any reasonable person that respondents lied when they told petitioner that the children's parasitemia levels were 25% each instead of 6.1% and 12.7%.

In September 1989, petitioner came across the CDC's *NEJM, July 13, 1989* article. That article states that the information contained in it was provided by physicians who treated patients between 1985 and 1987 under the CDC quinidine study protocol and named Dr. Stull as one of those physicians. *See, NEJM*, p.65, footnote, col.1. **Therefore, without the physicians' contributions,**

the CDC could not have published that article. The article also makes reference to a quinidine study article which Dr. Stull published in May, 1987.

Upon reading the articles in September, 1989, petitioner became aware that in addition to other violations such as violation of his civil, statutory and Constitutional rights, respondents had deceived him, lied, and misrepresented facts to him in 1985 about his children's medical conditions (see brief in C.A. No.90-1642, at 24-25). Dr. Stull's article indicates that the children were 'sucessfully' treated with quinidine and at the time of their discharge, no parasites could be found on pheripheral blood smears. This was a lie, deception and categorically false (see motion to correct misstatements). In fact, almost

all the information supplied to the CDC by Dr. Stull and his colleagues was false. According to the EKG readings by respondents' own expert witness, Dr. Anna C. O'Riordan of St Christopher's Hospital for Children, the Pediatric Heart Institute, Philadelphia, Pa., quinidine did affect the children. But Dr. Stull represented to the CDC and the medical community that no such effect took place and that at the time of the children's discharge from the hospital on the fifth day, ''...no parasites could be found on peripheral blood smears''. This is how some unscrupulous clinical investigators mislead the FDA to obtain approval for certain drugs(*The current FDA's investigation in certain medical devices is only one example)*. Indeed, at the time the children were being discharged from

the hospital, their parasitemia levels had not been reduced below 2%.

Consequently, petitioner was given a prescription for **ATABRINE** by Dr. Padua to treat the malaria. **ATABRINE** is a medication used to treat malaria.

On March 7, 1990, petitioner filed a lawsuit in E.D.PA on behalf of himself and his children against Dr. Stull and the MCP. On June 5, 1990, the trial Judge called a pretrial conference which was attended by petitioner and the attorney for Dr. Stull and MCP. Following the conference, the District Court issued a pretrial order which included a bifurcated trial (i.e. liability first and then damages). D.I. 15, Exhibit C; Ap.at 72. **This order was not modified.**

On July 16, 1990, when petitioner appeared for trial fully prepared to

follow the pretrial order to litigate the liability and damages issues, he was met with big surprises. The first was a trifurcated trial which included the statute of limitations rather than bifurcation (liability and damages) (Ap.at 75). The second surprise was that petitioner heard the trial judge tell the jury that the court had prepared a set of interrogatories to make the jury's job a lot easier. Petitioner was unaware of the interrogatories prior to hearing that in court. The third was that the trial judge had left out a number of petitioner's claims from the interrogatories including his claims for a violation of his civil rights, fraud, the use of the children in a study, concealment and misrepresentation. *See,* Ap. 9-10. Petitioner brought all the omissions to

the court's attention and requested that they be included in the interrogatories. The trial Judge refused. The above surprises probably did not happen without a reason considering what the judge said in court, and that is:

'' The basis of the lawsuit is that the children were cured and are well and healthy today. You ought to thank God for it. I find that very difficult for me to deal with...you ought not to be here quarreling about this. What harm did you suffer if they published the statistics? Are their names mentioned ?''D.I. 21, Exhibit B, at 26; Ap.at 70.

'' Mr. Osei-Afriyie, you ought to thank God that you and your children and your wife are healthy. I think you are wasting your time.''Ap. at 70-71.

Apparently, the trial Judge had read the articles and erroneously concluded, despite overwhelming evidence in the record, that the articles were about ''statistics''. However, the articles report the results of clinical studies.

One finds the following statements from the articles:

(a)'' The two patients... As in the previous study...'' D.I. 15, Exhibit I, at 1042, col.2, para.2, lines 8-12.

(b)'' We studied 17 patients...'' D.I. 15, Exhibit J, at 65, Abstract, lines 6-7.

(c)'' However, the patients were entered in our study ...'' D.I. 15, Exhibit J, at 69, col.2, para.1, lines 3-4.

(d) ''...a pattern also demonstrated by an isolate from a patient in the present study.'' D.I. 15, Exhibit J, at 69, para.2, lines 17-18.

(e)'' In our study...'' D.I. 15, Exhibit J, at 70, line 20, lines 17-18. (*See*, reply brief in C.A. No.90-1642, pp.19-20.

It, therefore, appears that the trial judge had coined the word 'statistics' to describe the two-year CDC sponsored prospective study similar to how he described the consent form. (*Tr., 7/17/90*,at 22, lines 20-24. The Judge had also read the July 13, 1989 article

and errroneously concluded that Dr. Stull did not contribute to it. He instructed the jury as follows:

''The article which appeared in the July 13, 1989 issue of the New England Journal of Medicine was not written or contributed to by Dr. Stull and therefore you are to disregard any claim for invasion of privacy based on this article'' (*Tr., 7/17/90*, at 38).

The above instruction was categorically erroneous. The CDC states the following in that article:

'' **The following physicians directed the care of the patients and provided information included in this article: Afred E. Bacon III,...Terrence L. Stull.''** *NEJM, July 13*, p. 65, footnote, col. 1. At this juncture, it is in order to quote how the Third Circuit interpreted the judge's jury instruction indicated above in its opinion in this case. It said: '' The district court dismissed that part of their invasion of privacy claim resulting from the article published in the New England Journal of Medicine, since Dr. Stull did not write

or actively contribute to that article.''

Surely, there is a difference between ''did not contribute'' and ''did not actively contribute'' The jury did not receive proper instructions.

Even apart from the above, the trial judge admitted in open court that he was not helpful to the jury in answering the latter's question as to whether the statute of limitations started to run when Dr. Stull published his article or when petitioner discovered the article. The court answered in the following way:

> ''...I know that may not be as helpful as you would like me to be, but you heard the evidence that when he became aware or did not become aware and that you will have to apply that to the law, the facts you heard. You saw the articles and you have that information.''
> (*Tr., 7/16/90* at 45, lines 10-18).

Petitioner immediately started to raise objection to that answer in front of the

jury but the court never gave him the chance. The Judge, being the master of the proceeding, told petitioner to wait and he waited until the jury left the courtroom.*Tr., 7/16/90* at 45,lines 18-21.

On July 17, 1990, the jury rendered its verdict in favor of Dr. Stull and MCP. Petitioner appealed and thereafter filed another lawsuit against Dr. Stull and MCP in the District of Delaware since he was convinced that his civil rights had been violated contrary to what the court in E.D. PA had said and since he also believed that he was not given a full and fair opportunity to litigate the E.D. PA action. That complaint was later amended to include Dr. Padua. Petitioner lost the appeal.

The respondents filed Motions for

Summary Judgement and for dismissal in the District of Delaware action. The court granted respondents' motions. Petitioner appealed that action and again lost. Before presenting the argument for granting Certiorari, petitioner thinks it is again in order to comment on the disposition of the appeal in the Pennsylvania action.

Petitioner emphatically believes that in its disposition of that appeal (C.A. 90-1642), the Third Circuit Court of Appeals applied a clearly erroneous legal standard and also wrote an opinion which was full of incorrect factual statements.

For instance, the Third Circuit imposed the burden of proof of an affirmative defense raised by respondents in Pennsylvania upon petitioner (But see, *Van Buskirt v. Carey Canadian Mines,*

Ltd., 760 F. 2d. 481 (3d. Cir. 1985), at 487). Therein, that burden was placed on the defendant. Second, that Court agreed with the district court(E.D. PA) that the date of publication of an article in a medical journal without evidence of petitioner having read the article starts to trigger the statute of limitations. (But see, *Hobson v. Wilson*, 737 F. 2d. 1, at 35 (D.C. Cir. 1984) cert. denied, Brennan v. Hobson, 470 U.S. 1084, 105 S. Ct.1843, 85 L. Ed.142(1985). Indeed,

''where the facts about causation may be in control of the putative defendant, plaintiff is more at the 'mercy' of the defendant and tolling is justified'' *Kubrick v. United States,* 444 U.S. 111.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH ITS PREVIOUS DECISION, THE DECISION OF THIS COURT AND THE DECISIONS OF OTHER COURTS.

II. THE APPELLATE COURT HAS SANCTIONED DEPARTURES FROM THE ACCEPTED AND USUAL

COURSE OF JUDICIAL PROCEEDINGS WHICH CALL FOR THIS COURT'S POWER OF SUPERVISION.

RES JUDICATA AND COLLATERAL ESTOPPEL ARE NOT APPLICABLE

A fundamental precept of common-law adjudication, embodied in the related doctrines of res judicata and collateral estoppel is that a '' right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction...cannot be disputed in a subsequent suit between the same parties or their privies...'' *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48-49 (1897). The Supreme Court described the purposes and importance of these two related doctrines in its 1979 opinion in *Montana v. United States,* 440 U.S.147, (1979) at 153-154 as follows:

'' Application of both doctrines is central to the purpose for which civil courts have been established, the

conclusive resolution of disputes within their jurisdictions...[Citations omitted]. To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions''

Therefore, according to the Supreme Court, the absence of a full and fair litigation of the issues precludes the application of the doctrines of res judicata and collateral estoppel. Courts have consistently applied the Supreme Court's holding in *Montana, supra*. *See Annaco, Inc. v. Hodel,* 675 F.Supp. 1052 at 1058 (E.D. Ky. 1987); *Walsh v. Intern. Longshoremen's Ass'n, AFL-CIO*, 630 F.2d 864, at 867- 869 (1980); and *Allen v. McCurry,* 449 U.S. 90. Even prior to *Montana, supra,* the Third Circuit had held in *Williamson v. Columbia Gas &*

Electric Corp., 186 F.2d 464 that:

'' The purpose of the principle of res judicata is to end litigation. The theory is that parties should not have to litigate issues which they have already litigated or had a reasonable opportunity to litigate.'' Id. 469.

Using the above standard, a proper appellate review when determining the application of the two related doctrines is to examine (1) whether the party against whom the doctrines are sought had a full and fair opportunity to litigate the issue in the prior action, and (2) whether the issues were litigated in the prior action. We will now examine whether the district and the appellate courts' orders are consistent with *Allen, Montana, and Williamson, supra*.

The district court's order is in Ap. C1-C20. Nowhere in that lengthy analysis did that court examine whether petitioner had

''a full and fair opportunity to litigate the prior action.'' The district court required Dr. Padua to satisfy three requirements for collateral estoppel to be applicable. They were: ''(1) the issues in this action must be the same as those in the Pennsylvania action, (2) the issues must have been fully litigated in the Pennsylvania action and (3) resolution of the issues must have been necessary to the outcome of the prior valid judgement.'' Neoplan, 640 F. Supp. at 1546.'' Ap. C at 19.

In fact, even in *Neoplan (1985), supra,* at 1546-1547, Judge Longobardi did analyze ''full and fair opportunity to litigate the prior action.'' In 1987, two years later, Judge Longobardi brilliantly stated the requirements of collateral estoppel doctrine as follows:

''The requirements for the application of collateral estoppel are well settled: (1) the issue sought to be litigated is identical to the one decided in a prior action; (2) the issue was actually litigated in the prior action; (3) resolution of the issue was essential to a final judgement in the prior action; and (4) the party against whom collateral estoppel is sought had a full and fair opportunity to litigate the issue in the prior action.'' *See, Studeingesellschaft Kohle, mbl v. USX Corp.,* 675 F.Supp. 182 (D.Del. 1987), at 184.

These requirements are in accord with *Montana and Allen, supra, In Re Asbestos Litigation (Lee)*, Del.Super., 517 A.2d 288, at 293 and *Lawlor v. National Screen Service,* 349 U.S. 322 at 326, (1955). Therefore, since Dr. Padua failed to show that petitioner had ''a full and fair opportunity to litigate the prior action'', allowing him to benefit from collateral estoppel would be **absolutely inconsistent** with *Montana and Allen, Studeingesellschaft Kohle, mbl,*

Williamson, and Lawlor, supra. Similarly, since the district court did not examine whether petitioner had a full and fair opportunity to litigate the prior action, Dr. Stull and MCP could not avail themselves of res judicata. *See, Montana Allen, Williamson, and Lawlor, supra*.

Next, it is petitioner's position that if the district court felt that it lacked personal jurisdiction over Dr. Padua, then in the interest of justice pursuant to 28 USC § 1406(a), it should have transferred the case to another district court (E.D. PA) which could exercise personal jurisdiction over him.

In the circumstances where venue is proper but dismissal would cause the termination of an action because of statute of limitations, courts have consistently permitted transfer and,

therefore, the Third Circuit's Order is **inconsistent** with the decisions below. *See, Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 467; *U.S. v. Berkowitz,* 328 F.2d 358, 361 (3d cir. 1964; *Cooke v. Sameiet M.S. Song of Norway,* 572 F.2d 77, 80-81 (2d cir. 1978); *Aquacate Consol Mines, Inc. of Costa Rica v. Deeprock, Inc.,* 566 F.2d 523 (5th Cir. 1978); *O'Neal v. Hicks Brokerage Co.,* 537 F.2d 1266 (4th Cir. 1976); *Taylor v. Love,* 415 F.2d 1118 (6th Cir. 1969), *cert. denied* 397 U S 1023; *Mayo Clinic v. Kaiser,* 383 F.2d 653 (8th Cir. 1967).

Although petitioner believes that the above inconsistent rulings by the lower courts demand that, in the interest of justice, this Court issue a Writ to review this case, petitioner would like to continue for the sake of completeness.

(1) **THE ISSUES ARE IDENTICAL.**

Dr. Padua had the burden of proving that the issues raised against him were identical to the issues in the prior action. Petitioner had alleged in his amended complaint, para. 16a that Dr. Padua and his colleagues willfully participated with the CDC to deprive and deny him of his rights guaranteed under the constitution and laws of the United States. This allegation was not made in the Pennsylvania action and, therefore, Dr. Padua could not and did not prove that that issue had been litigated.

(2) **THE ISSUES WERE ACTUALLY LITIGATED.**

The requirement that an issue must have been 'actually litigated' is 'generally satisfied if the parties to the original action disputed the issue and the trier of fact resolved it.' *See*,

Studeingesellschaft Kohle, mbl, supra., at 185. The respondents could only show that the parties disputed such issues as misrepresentation, fraud, concealment and involvement of the children in CDC's quinidine study protocol. However, they failed to show that the trier of fact resolved those issues. Indeed, they state in their supplemental memorandum of law (D.I. 22, 11/19/90) that the jury never heard a number of petitioner's claims and ''The Court had decided ... that the other causes of action contained in plaintiffs' Complaint were not viable.'' Respondents continued ''...Judge Weiner indicated that this was not an action requiring the discovery rule of the Statute of Limitations (NT July 17, 1990 pp.10-12). Judge Weiner concluded that the plaintiffs' civil rights were not

violated or breached by the defendants (NT July 17, 1990 pp. 20-22).'' *Also see, interrogatories to the jury,* Ap. H9-10 and appellant's brief (C.A. 91-3474), at 18.

It should be noted that those issues involved questions of material fact which, under the 7th Amendment to the United States Constitution, petitioner had the right to have them resolved by a jury *(See,Byrd v.Blueridge R.Elec. Coop.,* 356 U.S.525, at 537-538 (appellant's brief, at 26). Indeed, the existence of such disputed issues precludes granting a summary judgement . Also, under Rule 49(a) of the F.R.Civ.P., the Judge should have submitted all issues covered in the pleadings to the jury when petitioner made that request in a sidebar discussion before the jury

retired for deliberations. This is because there was evidence from the articles to prove those allegations. Judge Weiner had admitted *The NEJM, July 13, 1989* and Dr. Stull et al.'s *May 1987, JID* articles as evidence probably pursuant to F.R.Evid. 803(8)(C) and 803(18) and sent them out to the jury for deliberations.

Moreover, '' While a trial judge has broad discretion to determine which issue may be determined at trial,...he should exercise that discretion with an eye toward the expectation of the parties.'' *Price v. Inland Oil Co.*, 646 F.2d 90 (3d Cir.1981), at 96. *Emphasis added*. Furthermore, if a trial court was going to reject any of the plaintiffs' theory of liability, it should have done so before trial. To do so after submission

of evidence was abuse of discretion (*Price, supra.*, at 96). Of particular importance is the fact that The Circuit's ruling in the C.A. 90-1642 is in direct conflict with its previous ruling (Price v. Inland, Id.).

In fact, not only did Judge Weiner's conduct make collateral estoppel and res judicata inapplicable because he did not allow the trier of fact to resolve the factual issues, but also, by taking these factual issues away from the jury, he effectively denied petitioner his right to a jury trial which violates the spirit and intent of the Seventh Amendment. Since the issues were not presented and determined by the jury, Judge Weiner did not state any findings of fact on those issues (Ap. at B1) which could bind the parties. Hence, no collateral estoppel by

the former judgement is involved. *United States v. International Bldg. Co., 345 U.S.*, 345 U.S. 502, 506, and *Lawlor, supra*.

(3) **FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUES IN THE PENNSLYVANIA ACTION.**

This Court has seth forth some factors which a court might examine to determine whether a party had been afforded a 'full and fair opportunity' to litigate a particular issue. Among the criteria are: (1) whether the party was the plaintiff in the prior action and chose to litigate at that time and place; (2) whether the party was prepared to litigate against the defendant there involved; (3) whether the court purported to apply the applicable legal standards; (4) whether the prior case was one of those 'relatively rare instances where the

courts wholly failed to grasp the technical subject matter and the issues in suit' and (5) whether without fault of his own the party was deprived of crucial evidence or witnesses in the prior litigation. *Blonder-Tongue v. University Foundation,* 402 U.S. 313, at 332-333. There is no dispute that petitioner was a party to the prior action and that he chose to litigate at that time and place. Criterion number one is satisfied. However, for each of the reasons seth forth under sections (a) to (f) below, petitioner was **NEVER** given a full and fair opportunity to litigate his prior issues and, consequently, he was denied **DUE PROCESS** guaranteed him under the 14th Amendment to the United States Constitution.

a) Under Rule 16(e) of the Federal

Rules of Civ. Procedure (F.R.C.P.), the trial court may conduct pretrial conferences and simplify in a pretrial order the issues to be presented at trial. This order shall control the subsequent course of the action unless modified by a subsequent order. The Third Circuit of Appeals is willing to bind parties by a pretrial order in order to eliminate unfair surprises at trial *(Price, supra.)*. In *Price,* at 96, the 3d. Circuit held:

'' The chief purposes of pretrial conferences are to define and simplify the issues, to lessen surprises at trial and the risk of judicial error, to conclude stipulations on matters of evidence, and to promote settlements.''

In the instant case, the district judge held a pretrial conference and specifically told the parties that the trial would be limited to liability and

damages *(Please, obtain the notes written by the two members of Judge Weiner's staff who were present at the conference)*. Following the conference, the judge issued a pretrial order which included a bifurcated trial (liability and damages). Ap. B8. *See the judge's definition of a bifurcated trial in Tr.,7/16/90*, at 34, lines 11-14.

On the trial date when petitioner appeared for trial fully prepared to follow the pretrial order, he was met with a big surprise (i.e. trial trifurcation). Despite objections (which were not recorded) that petitioner was not prepared to litigate the statute of limitations issue at that time and that a continuance would be appropriate, the trial court refused that request and proceeded to try the case on the statute

of limitations. Petitioner was completely unprepared to argue the statute of limitations issue. Therefore, the trial court's failure to follow its own pretrial order and grant a continuance unfairly surprised petitioner, violated due process and promoted manifest injustice.

(b) Petitioner informed the trial judge that he had additional witnesses (Dr. Stull and MCP people) he wished to call *Transcript (Tr.)*, 7/16/90, at 37, lines 22-23. The judge never asked petitioner to call those witnesses. While the pro se petitioner did not expect or anticipate any favors from the trial court, he had every right to expect the judge to control the proceeding. Indeed, petitioner did nothing to show that he was abandoning his right to examine his

witnesses or have a fair trial. In fact, petitioner never rested his case and was, therefore, deprived of his crucial witnesses.

(c) Where written interrogatories are submitted to the jury, Rule 49(a) of the F.R.Civ.P. requires the court to give the jury,''such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury make its findings upon each issue.'' In the instant case the jury returned to open court to ask the court a question of law at the time it needed the guidance and direction of the court. By his own admission *Ante*, 28-29, the trial judge said he was not helpful to the jury. However, a Federal District Judge is not a moderator but a master of the proceeding. He has an obligation to charge on the essential elements of the

case and instruct as to the law on matters which developments of the trial make significant and important(*Callen v. Pennsylvania R. Co.*, 162 F. 2d 832 (3d Cir. 1947). Failure to perform that duty has resulted in a reversal of a District Court's judgement (*Beardshall v. Minuteman Press Intern.*, 64 F.2d 23, at 28-29 (3d. Cir. 1981). Also in *Monahan v. Flannery*, 755 F.2d 678 (8th Cir.1985), the court held that failure of district court to espound on instruction prejudiced plaintiff's case.

Professor Wright states:

''It is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the appicable law of the case, and to guide, direct and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth.'' ''2B Barron and Holtzoff, Fed. Practice and Procedure, Section 1105, at 470 (Wright ed. 1961).

Indeed, most of the facts in sharp controversy (i.e., using appellant's minors in the CDC's study protocol involving the use of quinidine, fraud, concealment, misrepresentation, publication of the study and minors' medical information) were never set forth by the trial judge. The trial judge, in his charge to the jury, merely set forth in an abstract fashion the laws with respect to some of the issues in the case, never relating them to the facts from the evidence in the articles. Petitioner believes that the trial judge was required to elaborate the facts from the articles and also give a clear guideline for their proper determination. In fact, he abysmally failed to carry out this obligation.

It is important in the determination

of factual questions, such as in the present situation, that the jury be completely and fully informed on the law relating to the evidence in the case. *McNello v. John B. Kelly, Inc.*, 283 F.2d 96 (3d Cir. 1960). As the Court in *Atkinson v. Roth,* 297 F.2d 570, 574 (3d. Cir. 1960), stated, '' If it is to be assumed that jurors have ordinary intelligence, it may not be assumed that they are students of law.''

In the instant case, the trial judge never charged the jury on the law relating to using petitioner's children as subjects in the CDC clinical study (21 U.S.C. § 355(i). He also left the disposition of the case to the jury without a thorough discussion of the matters in controversy. That court failed to apply the appropriate legal standard.

Surely, the trial Judge would not be

helpful to the jury and charge it on the law relating to human experimentation because 'the basis of the suit was that the children were cured', the articles were about 'statistics', petitioner 'ought not to be' in that court and petitioner was 'wasting' his time. *Ante,* at 25. In fact, even after petitioner had mentioned the Pennsylvania tolling statute relating to minors in court (42 P.C.A. Section 5533(b), the Judge later said:

''Do you think the Court has to wait 21 years until they can read?'' *Tr., 7/16/90*, at 46, lines 8-9). Obviously, petitioner's fate had already been determined before he reached the courtroom. This is constitutionally intolerable. Litigants who properly invoke the jurisdiction of federal courts have the consitutional right to be in

those courts to have their claims heard, and heard by a jury if that option was timely exercised.

The E.D.PA court's conclusion that the basis of the suit was that the children were cured plus the fact that it had described a CDC- sponsored prospective study *(for which an IND had been filed with the FDA)* as 'statistics' leaves one with no choice but to conclude that the case was one of those ''relatively rare instances where the court failed to grasp the technical subject and the issues in suit.''

(d) Petitioner tried to introduce evidence through his witness on how MCP employees, for example, Dr. Rudnitsky and Dr. Padua lied to conceal material fact from him but the Court disallowed the testimony. *Tr., 7/16/90* at 34-35. However, as the D.C. Circuit ruled in

U.S. V. Paxson, 861 F.2d 730, at 734 (1988), a statement by a party's agent or servant concerning a matter within the scope of agency or employment, made during the existence of the relationship is admissible under Fed.R.Evid. 801(d)(2)(D), (quoting the 10th Circuit and the Supreme Court). *See United States v. Young,* 736 F.2d 565, 567 (10th Cir.1983), 470 U.S. 1, 1985). *Also, see Savarese v. Agress,* 883 F.2d 1194 (3d Cir. 1989)(801(d)(2)(A). Petitioner was, therefore, denied both his crucial evidence and the testimony of his witness.

(e) On July 16, 1990, the trial judge told petitioner that he would be given the opportunity to present cases to support his argument on discovery rule at 9:30a.m. on July 17,1990 (*Tr., 7/16/90,*

at 45-46). About 9:30 a.m. on July 17, 1990, petitioner asked the Court for permission to present those cases before the jury gave its verdict. The trial judge refused and told petitioner that he would be given the opportunity to do that after the jury's verdict (*Tr., 7/17/90,* at. 2. Why did the judge fail to carry out his promise? As noted, he had already made up his mind before coming to the courtroom that the action did not involve the discovery rule of the statute of limitations (*Ante,* at 39-40).

(f) Judge Weiner decided to use special verdict interrogatories on the statute of limitations without informing petitioner. When petitioner saw the questions at trial, he requested that interrogatories on all the issues raised in the complaint be submitted to the jury. The court

refused and the 3d. Circuit has concurred with the trial court. Opinion, Ap. A93.

The 3d. Circuit failed to note that Dr. Stull's and the CDC's articles are admissible as evidence pursuant to F.R.Evid. 803 (8)(C) and 803(18). The jury had this evidence. However, it was misled by the judge to disregard the articles for two reasons: (1) the date of publication of an article in a medical journal without plaintiff having read it constitutes a notice to trigger the running of the statute of limitations (this is inconsistent with *Hobson v. Wilson* 737 F.2d 1, at 35 and 38, n. 116)(D.C. Cir. 1984), and (2) Dr. Stull did not contribute to the *NEJM, July 13, article. Ante,* at 27.

It should be noted that Osei-Afriyie had alleged that his emotional distress

was also caused in part upon being informed through the CDC's article that Dr. Stull had used his children as subjects in his study. Given the verdict, it seems clear that the jury never considered petitioner's crucial evidence (i.e. the CDC July 13, 1989 article) and the part it played in petitioner's claims. If it had, then the verdict was not supported by the evidence in the record and it should have been reversed by the the 3d. Circuit as plain error. That article was written in 1989 and petitioner brought suit within less than one year after it was published.

The 3d. Circuit also failed to recognize that when a trial court utilizes special verdict under Rule 49(a) of the F.R.Civ.P., although vested with a wide discretion as to form and contents

of questions, it should, especially when requested to do so, submit interrogatories covering all issues raised by the pleadings (*Mickey v. Tremco Mfg.*, 226 F.2d 956 (1955). This language is mandatory.

CONCLUSION

Finally, a review of cases on res judicata and collateral estoppel shows, beyond any legitimate dispute, that the application of both doctrines requires an examination of whether the party against whom the doctrines are asserted had a full and fair opportunity to litigate the prior action. This, the district and the appellate courts did not do which is **inconsistent with** *Montana and Allen, supra*. A further review of cases applying statutory law (i.e., 28 U.S.C. 1406(a)) also shows that, in the interest

of justice, where a district court lacks personal jurisdiction, the case is transferred to another federal court which can exercise jurisdiction over the defendant. This, the Delaware court and the 3d. Circuit failed to do regarding the case against Dr. Padua which is **inconsistent with** *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 467; *U.S. v. Berkowitz,* 328 F.2d 358, 361 (3d cir. 1964).

The history of our Constitution, a review of cases interpreting our constitution, and basic principles of constitutional fairness should have been noted by the Courts below. The fundamental right for petitioner to due process of law and as a parent to decide (1) for his children to be free from medical experimentation, (2) for the

children's medical 'treatment' to be free from unwanted publicity , and (3) to have a jury trial on all issues alleged in complaint should be protected by this Court.

Respondents could not rely on res judicata and collateral estoppel because they failed to show petitioner had a full and fair oppotunity to litigate the issues in the Pennsylvania action. *See, Montana,supra*. They could not also rely on the doctrines because the right questions or facts (i.e., medical experimentation involving petitioner's children, misrepresentation, fraud and concealment) were not distinctly put in the issues and determined by the trier of fact. *See, Montana, supra, quoting Southern Pacific R. Co. v. United States, supra*. Since there were no findings of

fact in the above issues, the judgement rendered could not possibly affect those issues. *Lawlor, supra.*

The principles of res judicata and collateral estoppel are procedural rules and were never intended to supersede the 5th,7th, 9th and 14th Amendments to the United States Constitution. This fact, together with petitioner's cogent arguments advanced above, suggests that the matter be remanded to the district court for a jury trial. If a jury decides (1) that respondents did not involve petitioner's children in the CDC quinidine clinical study or trial, (2) that Dr. Stull did not contribute to the July 13, 1989, article, (3) that respondents did not misrepresent medical facts about minors to petitioner, (4) that respondents did not commit fraud,

(5) that respondents did not conceal minors' involvement in the CDC's quinidine clinical study from petitioner and (6) that the discovery rule is not applicable, the inquiry ends. Conversely, if a jury decides otherwise, it will be proof positive that the judgement in the Pennsylvania action was groundless and it should have been properly disregarded. As some courts put it, Osei-Afriyie ''never had his day in court''. In fact, before he arrived in the Pennsylvaia court the outcome of the case had been predetermined. The trial was held just to give a blessing to an outcome already predetermined. Public welfare and due process of law demand that the agencies or institutions set up to administer justice should not undo justice.

The factual situation in the instant

case presents an appropriate vehicle for the Court to exercise its power of supervision to ensure consistency in the application of federal rules of procedure and evidence as well as decisions made by courts. Unless this Court grants review and reverses, the decision below will (1) remain as a precedent and make a mockery of federal rules, (2) make a mockery of decisions reached by this court and other circuit courts and (3) make a mockery of the Constitutional Amendments and statutory laws passed by Congress. In the alternative, if petitioner is correct for reasons seth forth herein, to resolve the issues on the merit, the matter should be remanded to the district court for appropriate disposition under the due process of the 14th Amendment and in an environment where petitioner should be

afforded a full and fair opportunity to litigate the issues.

Who knows how many patients are going through medical experimentation undetected in violation of the law? Who knows how many more patients will be viewed as treasure troves or gardens to be harvested if this Court, the final arbiter, fails to act on this issue of public interest?

This Court should issue a Writ of Certiorari to review the Judgement Order of the United States Court of Appeals for the Third Circuit for the reasons seth forth herein.

Dated March 24, 1992.

Respectfully submitted,

FRANCIS OSEI-AFRIYIE
P.O.BOX 185
DOVER, DE 19903-0185

APPENDIX A

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3474

JENNIFFER AND MONICA OSEI-AFRIYIE, minors, Individually, by their parent, FRANCIS OSEI-AFRIYIE, and in His Own RIGHT,
Appellants

v.

THE MEDICAL COLLEGE OF PENNSYLVANIA; STULL TERRENCE LEE, M.D., THAD PADUA, M.D.

On Appeal from the United States District Court for the District of Delaware
(D.C. Civil Action No. 90-00388)
District Judge: Honorable Joseph J. Longobardi

Submitted December 10, 1991
Before: MANSMANN, HUTCHINSON and NYGAARD,
Circuit Judges

JUDGEMENT ORDER

After consideration of all contentions raised by the appellants, it is ADJUDICATED AND ORDERED that the judgement of the district court be and hereby

affirmed.

Costs taxed against the appellants.

BY THE COURT,

/s/

Carol Los Mansmann
Circuit Judge

Attest:
/s/
Sally Mvros, Clerk
Dated: December 26, 1991

Filed July 1, 1991

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1642

JENNIFFER AND MONICA OSEI-AFRIYIE,
minors,Individually, by their
parent, FRANCIS OSEI-
AFRIYIE, and in His Own RIGHT,
Appellants

v.

THE MEDICAL COLLEGE OF PENNSYLVANIA
and STULL TERRENCE LEE, M.D.
Appellees

On Appeal from the United States District
Court for the Eastern District of
Pennsylvania
(D.C. Civil Action No. 90-01566)

Submitted Under Third Circuit Rule 12(6)
February 14, 1991
Before: SLOVITER, HUTCHINSON and ALTO,
Circuit Judges
(Opinion Filed July 1, 1991)

FRANCIS OSEI-AFRIYIE
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Pro se Appellant

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge*.

Francis Osei-Afriyie (Osei-Afriyie), in his own right and as father of minors Jennifer and Monica Osei-Afriyie (the children), appeals from a jury verdict entered against him and his daughters in the United States District for the Eastern District of Pennsylvania. The jury found that Osei-Afriyie did not bring this suit on behalf of himself and his children soon enough to meet the applicable statute of limitations.

Osei-Afriyie, who is not a lawyer, represented himself and his children at trial without the assistence of legal

counsel. Osei-Afriyie continues to represent himself and his children *pro se* on appeal. The complaint at issue here raised a plethora of claims against the Medical College of Pennslyvania (the hospital) and one of the hospital's doctors following successful treatment of the children for malaria they contracted during a visit to Africa.

For the reasons set forth below , we will affirm the jury's verdict to the extent that it found Osei-Afriyie's own claims to be time-barred. However, we will vacate that portion of the jury's verdict that dismissed the children's claims because we hold that in accord with the two other courts of appeals that have considered this issue, a parent who is not an attorney must be represented by legal counsel in bringing an action on behalf of

his or her children.

I

Osei-Afriyie and his children visited Ghana, Africa, from February through early July of 1985. Upon their return to the United States, the children displayed signs of ill health: both suffered from distended abdomens and a fever, and Monica evidenced dehydration and malnutrition. Soon after their return, the children were admitted into St. Christopher's Hospital, where they were diagnosed as suffering from inflammation of the middle ear. The children were treated and discharged from St. Christopher's.

In the early morning hours of July 25, 1985, Jennifer's mother observed that Jennifer suffered from a fever and diarrhea. At 6:30 a.m. on July 25, 1985, the children arrived at the emergency of

the Medical college of Pennsylvania. In the emergency room, Jennifer, who was then two and one-half years old, was found to have a fever of 105.8 degrees. Monica, who was then ten months old, was found by the emergency room staff to have a fever of 103.6 degrees. Following blood tests, both were diagnosed as suffering from the most serious form of malaria. While a parasite level of six percent is considered high, the hospital reports that the children displayed parasite levels of nearly twenty-five percent. In his complaint, Osei-Afriyie claims that the children's parasite levels never exceeded thirteen percent.

Malaria has been nearly eradicated within the United States. As a result, drug manufacturers no longer regularly produce Quinine, the federally-approved

drug to combat the illness, nor do hospitals keep a supply of quinine on hand. Instead, the Centers for Disease Control (CDC) in Atlanta, Georgia, is the sole source of the drug. When doctors at the hospital contacted the CDC and requested quinine, CDC officials informed the doctors that it would take eight to twelve hours before the drug arrived in Philadelphia.

Given the children's precarious condition, doctors at the hospital did not believe it would be wise to postpone treatment until the quinine arrived. Instead, the doctors began to treat the children with quinidine, a drug that was known to combat malaria but that the Food and Drug Administration (FDA) has approved only for the treatment of irregular heartbeats.

Osei-Afriyie claims that the doctors did not ask his permission to treat the children with Quinidine until hours after the treatment began. The hospital, on the other hand, states that Osei-Afriyie initially gave permission to use Quinidine on the children. In addition to the drug treatment, the hospital also performed blood transfusions upon Monica, since doctors suspected that she had a cerebral malaria.

According to Osei-Afriyie, when he learned that the hospital had began to administer Quinidine to his chilren, he asked the hospital to stop use of the drug, since it was not an FDA-approved treatment for malaria. Despite the fact that Quinidine was an experimental drug in the treatment of malaria, it worked quite successfully in combating the children's

malaria. On the day after they had been admitted into the hospital, both children exhibited greatly reduced blood parasite levels of under two percent. That day Quinine arrived at the hospital, but the hospital did not administer it since the children had displayed such marked improvement and since no one knew the effects of administering Quinine and Quinidine together to the same patient.

Following their treatment with Quinidine, both children made complete recoveries. Before leaving the hospital, Osei-Afriyie states in the complaint that he expressly refused to give permission to have information about the successful treatment of his daughters reported in any medical publications.

In the May, 1987 edition of the Journal of Infectious Diseases, Dr. Terrence

L.Stull (Stull) of the Medical College of Pennsylvania published an article entitled ''Continuous-Infusion Quinidine Gluconate for Treating Children with Severe Malaria.'' In the article Dr. Stull told the story of his successful treatment of the children's malaria. Neither child was identified by name; Monica was referred to as ''sibling A and Jennifer was referred to as ''sibling B.'' However the article was not bereft of identifying details: for example, it mentioned that the children contracted malaria during a five-month visit to the West African nation of Ghana.

In the July 13, 1989 issue of the New England Journal of Medicine, doctors from the malaria branch at the Centers for Disease Control published an article entitled''Treatment of Severe Malaria in the United States with a Continuous

Infusion of Quinidine Gluconate and Exchange Transfusion.'' This article also included an account of the treatment the children received, but once again they were not directly identified. Dr. Stull did not write or participate in the publication of this second article, but its authors relied upon Dr. Stull's article as a source.

On March 7, 1990, Osei-Afriyie filed a *pro se* complaint in the United States District Court for the Eastern District of Pennsylvania against the hospital and the doctor. The plaintiffs named in the complaint were Osei-Afriyie in his own right and Osei-Afriyie on behalf of his two minor children. In the twelve page, single-spaced complaint, Osei-Afriyie alleged claims on behalf of the children, for assault and battery, negligence, lack

of informed consent, ''wrongful discharge'' of confidential information and invasion of privacy. In his own right, Osei-Afriyie alleged at a minimum, a claim for intentional infliction of emotional distress. He also sought to recover punitive damages on behalf of himself and the children.

In the complaint, Osei-Afriyie attempted to invoke the district court's jurisdiction in two ways, by alleging diversity of citizenship and by claiming that his complaint contained claims that arose under federal law. Aside from citing several sections from the Code of Federal Regulations, Osei-Afriyie mentioned U.S.C.A. § 1983 (West 1981), which permits a suit against state actors for deprivation of rights secured under federal law, and 21 U.S.C.A. § 355(i)

(West 1972), which concerns use of experimental drugs in research.

On June 28, 1990, the hospital and Dr. Stull moved for a partial judgement. The hospital and Dr. Stull argued, in part, that the claim Osei-Afriyie brought in his own right was barred under the applicable statute of limitations. *See Appendix (App.) at 75)*. On July 9, 1990, the hospital and Dr. Stull filed another motion for summary judgement, this time focusing on the children's invasion of privacy claim. The district court denied both motions for summary judgement.

On July 16, 1990, the suit came to trial before a jury. The district court ruled that the trial would be ''trifurcated.'' First, the jury would hear evidence pertinent to whether the suit was commenced within the statute of

limitations applicable to the various claims seth forth in the complaint. Then, if any claims survived the statutes of limitations phase of the trial, the liability and damages phases would begin. The sole witness of the statute of limitations phase was Grace Atea Ampofoh (Ampofoh), who is Osei-Afriyie's wife and the mother of the children. She testified that Osei-Afriyie learned on the morning of July 25, 1985 that the children received Quinidine. Osei-Afriyie did not introduce any testimony whatsoever as to when he learned of the articles mentioned in his complaint.

Following Ampofoh's testimony, the district court allowed the parties to make some closing remarks and then charged the jury on the statutes of limitations that applied to each of Osei-Afriyie and his

children's claims. The parties agree that Pennsylvania law is applicable to the state law claims raised in the complaint. The district court told the jury that under Pennsylvania law there is a two year statute of limitations applicable to the children's claims for assault and battery, negligence, lack of informed consent and wrongful discharge of confidential information. *See* 42 Pa. Cons. Stat. Ann. § 5524(1), (2), (7) (Purdon Supp. 1991). The district court explained to the jury that under Pennsylvania law there is a one-year statute of limitations applicable to the children's claim of invasion of privacy. *See* 42 Pa. Cons. Stat. Ann. § 5523(1) (Purdon Supp. 1991). The district court dismissed that part of their invasion of privacy claim resulting from the article published in the New England

Journal of Medicine, since Dr. Stull did not write or actively contribute to that article. *See* App. at 38. As to Osei-Afriyie's own claim that he suffered intentional infliction of emotional distress, the district court instructed the jury that under Pennsylvania law a two-year stature of limitations applied. *See* Pa. Cons. Stat. Ann. § 5524(7) (Purdon Supp. 1991).

After delivering these instructions, the district court asked Osei-Afriyie and the attorney who represented both the hospital and Dr. Stull to engage in a discussion at sidebar out of the jury's hearing. Following the sidebar conference, the district court gave the following instruction:

Ladies and gentlemen of the jury, if you find that there was anything hidden

from the plaintiff, that in other words, he could not discover this then the statute did not begin to run. His position is that it was hidden - he claims that Dr. Stull conducted studies of the use of Quinoidine [sic] and - if you find that was hidden from him and he could not discover it, the statute could not begin to run.

App. at 42-43. Then, the district court sent the jury to begin its deliberations. Osei-Afriyie did not make a timely objection to any of the district court's instructions before the jury retired to begin its deliberation.

The next morning the jury returned its verdict. It found that, under Pennsylvania law, the statute of limitations had expired with respect to each of the children's claims and Osei-

Afriyie's claim in his own right. The district court entered judgement in favor of the hospital and Dr. Stull on July 17, 1990.

On July 26, 1990, Osei-Afriyie filed a motion for reconsideration on behalf of himself and his children. In the motion, Osei-Afriyie advanced three grounds for a new trial. First, he argued that the district court "erred in instructing the jury that the suit was based on medical malpractice." Second, he contended that "the decision to instruct the jury on the statute of limitations was erroneous." Finally, he averred that "the types of instructions the jury received from the Court was [sic] erroneous." On August 20, 1990, the district court entered an order dismissing the motion for reconsideration due to lack of prosecution. The district

court ruled that Osei-Afriyie had failed to comply with Rule 20(e) of the Local Rules of the United States District Court for the Eastern District of Pennsylvania, which states:

> Within ten (10) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trial by a writing delivered to the Court Reporter Coordinator, or (b) filed a verified motion showing good cause to be excused from this requirement. Unless a transcript is thus ordered, or the movant excused from obtaining a transcript, the post-trial motion must be dismissed for lack of prosecution.

On August 24, 1990, Osei-Afriyie filed this appeal on behalf of himself and his children. In the notice of appeal, he

sought review of the district court's judgment entered July 17, 1990 and the district court's order dismissing his motion for reconsideration entered August 20, 1990. We have jurisdiction over this appeal since it was timely filed after the district court entered its final order on August 20, 1990. *See* 28 U.S.C.A. § 1291 (West Supp. 1991).

On appeal, Osei-Afriyie continues to appear *pro se* on his own behalf and on behalf of his children. He raises numerous arguments upon appeal. First, he contends that the district court misread his complaint and treated it solely as a claim of medical malpractice. Second, he claims that the district court incorrectly charged the jury on Pennsylvania case law providing, under the so-called discovery rule, that the applicable statute of

limitations does not begin to run in certain suits until a plaintiff knew or reasonably should have known that he had a cause of action. *See, e.g., Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 85, 468 A.2d 468, 471 (1983) (discovery rule "arises from *inability* of the injured, *despite the exercise of due diligence*, to know of the injury or its cause") (emphasis in original); *Ayers v. Morgan*, 3907 Pa. 282, 154 A.2d 788 (1959) (announcing discovery rule in context of medical malpractice case). Third, Osei-Afriyie argues that the district court should have had the jury decide only whether the statute of limitations on his own claim of intentional infliction of emotional distress had run, since the statute of limitations as to each of his children's

claims was tolled until the particular child reached the age of majority. Fourth, Osei-Afriyie contends that the district court should not have dismissed his post-trial motion for reconsideration for lack of prosecution since he attached to it sufficient materials to permit a decision on its merits. Finally, Osei-Afriyie maintains that certain statements the district judge made to him,, both after the jury had retired to deliberate and after its verdict, indicate unfairness and prejudice that required the district judge to recuse.

II.

The district court exercised jurisdiction over this matter pursuant to 28 U.S.C.A. § 1331 (West Supp. 1991) since the complaint alleged causes of action arising under federal law and under 28

U.S.C.A § 1332(a)(2) (West Supp. 1991) since Osei-Afriyie is a citizen of Ghana and his children are citizens of Canada and their complaint sought damages in excess of the jurisdictional minimum.

At this portion of the opinion, we would normally set forth the applicable standard of review for each of the issues raised in the appeal. However, for reasons we detail below, we need not decide any of the issues Osei-Afriyie raises on behalf of his children in this appeal. Thus, we are left only with issues related to the count of the complaint in which Osei-Afriyie sought to recover in his own right and will set forth only those standards applicable to his personal claims.

Osei-Afriyie claims that the district court mistakenly instructed the jury

concerning the statute of limitations applicable to his intentional infliction of emotional distress claim. Osei-Afriyie did not advance a timely objection to the district court's jury instruction; as a result, we are limited to review of the district court's instruction for plain error. See *Choy v. Bouchelle*, 436 F.2d 319, 325 (3d Cir. 1970) (applying plain error standard to review of jury instructions after defendant failed to object to charge at trial). We review for abuse of discretion the district court's dismissal of his motion for reconsideration due to lack of prosecution. *See Smith v. Oelenschlager*, 845 F.2d 1182, 1185 (3d Cir. 1988) (ruling that district court's dismissal of motion seeking new trial for failure to comply with Local Rule 20(e) was not abuse of

discretion). Finally, we examine Osei-Afriyie's recusal argument for plain error since he did not request that the district judge recuse himself while these proceedings were pending in the district court. *See United States v. Schreiber*, 599 F.2d 534, 536 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979).

Plain errors are those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936). They are errors that "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *United States v. Young*, 470 U.S. 1, 16 (1085). The Supreme Court has cautioned that the doctrine is to be used "sparingly," *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982), and

only where the error was sure to have had "an unfair prejudicial impact on the jury's deliberations," *Young*, 470 U.S. at 16, n.14.

III.

As far as we can glean from the record, Osei-Afriyie is a well-educated economist. He is not, however, a lawyer, and his lack of legal experience has nearly cost his children the chance of ever to have any of their claims heard. The district court, in first sending this case to the jury on the statutes of limitations issue, correctly instructed the jury as to the various applicable limitations periods. However, the district court committed one important error, an error that is directly traceable to Osei-Afriyie's lack of experience as a lawyer.

When the district court instructed the

jury about the applicable Pennsylvania statutes of limitations, it failed to take into account 42 Pa. Cons. Stat. Ann. § 5533(b) (Purdon Supp. 1991). The most recent amendment to § 5533 states:

(b) Infancy. - If an individual entitled to bring a civil action is an unemancipated minor at the time the cause of action accrues, the period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the same time for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter. As used in this subsection the term "minor" shall mean any individual who has not yet attained the age of 18.

Id. This version of § 5533 went into effect thirty days following its

enactment. The amendment was enacted on May 30, 1984. *See Urland ex rel. Urland v. Merrell-Dow Pharmaceuticals, Inc.*, 822 F.2d 1268, 1276 (3d Cir. 1987) (noting that the prior version of §5533 did not permit tolling for infancy). The children were not admitted into the hospital until 1985, and no one has ever suggested that any of their claims could have arisen before then. Therefore, tolling for infancy is applicable. *See Bowser v. Zachary,* 375 Pa. Super. 481, 485, 544 A.2d 1022, 1024 (1988) (section 5533(b) tolls statute of limitations for personal injuries suffered during minority); *Mazur v. Merck & Co.*, 742 F. Supp. 239, 248 n.12 (E.D. Pa. 1990) (same). As a result of § 5533(b), the statutes of limitations applicable to the children's claims have yet to begin to run.

Although Osei-Afriyie alluded to tolling of the statutes of limitations in his closing remarks to the jury, the record shows that he did not ask the district court for a jury instruction on tolling due to infancy, nor did he object to the absence of such an instruction. Not having been made aware of § 5533(b), the jury found that all of the children's claims were time-barred. Ordinarily, we would have to decide whether the district court's failure to instruct the jury concerning tolling due to infancy amounted to plain error. We need not make this decision because we hold that Osei-Afriyie, a non-lawyer appearing *pro se*, was not entitled to play the role of attorney for his children in federal court. This holding puts us in accord with the only other two courts of appeals

that have considered this issue.

In Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59 (2d Cir. 1990), the court wrote:

A litigant in federal court has a right to act as his or her own counsel. *See* 28 U.S.C. § 1654 (1982) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . ."). The statutory right to proceed *pro se* reflects a respect for the choice of an individual citizen to plead his or her own case. The right to conduct one's own litigation "is a right of high standing, not simply a practice to be honored or dishonored by a court depending on its assessment of the desiderata of a particular case."

However, we agree with *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir.

1986) (per curiam), that a non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child. The choice to appear *pro se* is not a true choice for minors who under state law, *see* Fed. R. Civ. P. 17(b), cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect, and the sole policy at stake concerns the exclusion of non-licensed persons to appear as attorneys on behalf of others.

It goes without saying that it is not in the interest of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.

Id. at 61 (citations omitted). As a

result of its reasoning, the court remanded the appeal to the district court so that it could either appoint counsel under 28 U.S.C.A. § 1915(d) or dismiss the complaint without prejudice.

The Tenth Circuit is in accord. *See Meeker v. Kercher,* 782 F.2d 153, 154 (10th Cir. 1986) ("We hold that under Fed. R. Civ. P. 17(c) and 28 U.S.C.A. § 1654, a minor child cannot bring suit through a parent acting as next friend if the parent is not represented by an attorney."); *see also Lawson v. Edwardsbury Public School,* 751 F. Supp. 1257, 1258 (W.D. Mich. 1990) ("While a litigant has the right to act as his or her own counsel, see 28 U.S.C. § 1654, a non-attorney parent is not permitted to represent the interests of his or her minor child.").

Here, no party has raised the issue of

whether Osei-Afriyie could represent his children as a *pro se* litigant. The record shows that Osei-Afriyie did not want to retain an attorney because he did not want to share any recovery from the litigation. *See* App. at 64-65.

In *DuPont v. Southern Nat'l Bank of Houston, Tex.*, 771 F.2d 874, 882 (5th Cir. 1985) (quoting *Richardson v. Tyson*, 110 Wis. 572, 578, 86 N.W. 250, 251 (1901)), *cert. denied*, 475 U.S. 1085 (1986), the court wrote:

> As one court explained, "[T]he infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him."

Since no competent party here had the incentive to draw the district court's

attention to the fact that the children should have been represented by a qualified attorney, we do not view this issue as waived. The right to counsel belongs to the children, and, under the cases from the Second and Tenth Circuits discussed above, the parent cannot waive this right.

In accord with the decisions discussed above, we hold that Osei-Afriyie was not entitled, as a non-lawyer, to represent his children in place of an attorney in federal court. As a result, we will vacate the judgment entered against the children on their claims.

On remand, one of several scenarios may occur. Osei-Afriyie may decide to secure a lawyer and proceed once again with his children's claims. Osei-Afriyie may determine not to pursue the litigation, in

which event the children's claims can be dismissed without prejudice, to accrue for purposes of the relevant statutes of limitations when the children reach eighteen years of age, or sooner if they become emancipated minors. Finally, the district court may exercise its discretion pursuant to 28 U.S.C.A. § 1915(d) (West 1966) to appoint counsel to represent the children, if it sees particular merit to their claims and believes that the children otherwise would not be able to secure qualified legal representation and that they would be prejudiced by having to wait until they become old enough to sue on their own. We wish to note that Osei-Afriyie has not secured *in forma pauperis* status for himself, and we are not suggesting that the children's claims are appropriate for appointment of counsel

under § 1915(d). That issue is one for the district court in the first instance.

Since we will vacate the district court's judgment against the children on their claims, it is unnecessary for us to examine whether the district court properly construed the portion of the complaint that contained their claims. It is also unnecessary for us to decide whether the district court committed plain error when it failed to take into account the Pennsylvania statute that tolls the applicable statutes of limitations in civil actions brought by minors until the child reaches the age of eighteen.

IV.

We not turn to examine the issues Osei-Afriyie raises that relate to Count Five of the complaint, the sole count he brought in his own right. In Count Five,

Osei-Afriyie expressly sought to recover for intentional infliction of emotional distress.

The district court instructed the jury that there was a two year statute of limitations applicable to claims of intentional infliction of emotional distress. *See* 42 Pa. Cons. Stat. Ann. § 5524(7) (Purdon Supp. 1991). Osei-Afriyie filed his complaint on March 7, 1990. Therefore, for his claim to have been timely it must have accrued within the two years preceding the filing of his complaint.

As plaintiff, under Pennsylvania law, Osei-Afriyie had the burden of proving at trial that he filed his own action within the two year statute of limitations applicable to his claim. *See McPhilomy v. Lister,* 341 Pa. 250, 252, 19 A.2d 143, 144

(1941) (holding that since "the statute of limitations was pleaded, it was incumbent upon the plaintiff to prove facts sufficient to remove the bar of the statute"); *Corbett v. Weisband* 380 Pa. Super. 292, 308, 551 A.2d 1059, 1067 (1988) (holding that "(w)here the statute of limitations is at issue, the burden of proof falls on the plaintiff to demonstrate that the cause of action is not barred by the passage of time and that his or her failure to file the action in a timely fashion is excusable."), *alloc. denied*, 524 Pa. 607, 569 A.2d 1367 (1989).

Osei-Afriyie introduced one witness at trial, his wife, Ampofoh. She testified that Osei-Afriyie learned on the morning of July 25, 1985 that Quinidine had been administered to his children. In the complaint, Osei-Afriyie traces part of his

alleged emotional distress to having watched while "his minor children (were) used as research subjects without their consent." Whatever emotional distress he suffered on July 25, 1985 was clearly time-barred because Osei-Afriyie did not bring suit until 1990.

Osei-Afriyie also claims that his emotional distress was caused in part by Dr. Stull's publication of his research on the use of Quinidine to treat malaria. As noted above, Dr. Stull's article was published in a medical journal dated May, 1987. The date of the journal was also more than two years before Osei-Afriyie commenced suit.

In his brief on appeal, Osei-Afriyie argues that he did not learn of Dr. Stull's article until shortly before he brought suit. He thus contends that his

cause of action was timely, since he did not sooner discover the article, nor should he reasonably have discovered it any sooner. Osei-Afriyie had the burden of convincing the jury that his suit was timely. His sole witness at the statute of limitations phase of the trial, Ampofoh, gave no testimony as to when Osei-Afriyie learned of the article. Thus, it was not unreasonable for the jury to rule in favor of the hospital and Dr. Stull since Osei-Afriyie produced no evidence that he met the statute of limitations. Indeed, when the party with the burden of proof comes forth with no evidence, and no other evidence is before the jury, judgment must be entered against the party because it has failed to meet its burden. *See Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178

(3d Cir. 1976) (noting that "a trial judge, when deciding on a motion for directed verdict or for judgment notwithstanding the verdict, should not determine whether the evidence 'preponderates' but must confine himself to ascertaining whether the party against whom the motion is made adduced sufficient evidence to create a jury issue"), *cert. denied*, 429 U.S. 1053 (1977); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (noting that entry of summary judgment is proper "against party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

Osei- Afriyie also contends on appeal that Count Five asserts claims for

misrepresentation and violation of his civil rights. He then goes on to argue that the district court failed to submit these claims to the jury. Osei-Afriyie failed to make a timely objection at trial to the district court's omission of these counts from its jury instructions; thus, we once again review for plain error. Even if Count Five's language read free-form could be stretched to raise inferentially these additional claims, the district court did not commit plain error in omitting these from its charge to the jury.

The statute of limitations for misrepresentation is two years under Pennsylvania law. *See* 42 Pa. Cons. Stat. Ann. § 5524(7) (Purdon Supp. 1990). The statute of limitations for any civil rights claim that Osei-Afriyie sought to

plead under 42 U.S.C.A. § 1983 as arising from these events is also two years, because § 1983 claims "borrow" a state's personal injuries limitations period and Pennsylvania statute of limitations for personal injuries is two years. *See Cito v. Bridgewater Township Police Dep't*, 892 F.2d 23, 25 (3d Cir. 1989) ("The statute of limitations for any Section 1983 claim is the state statute which limits actions for personal injuries.").

The jury found, pertinent to Osei-Afriyie's emotional distress claim, that he knew of the treatment to his children more than two years before he brought suit. The jury also found Osei-Afriyie failed to carry his burden of proof that his emotional distress claim arising out of the article was timely. Since Osei-Afriyie's misrepresentation and civil

rights claims are based upon the very same facts as his intentional infliction of emotional distress claim, it seems plain that the jury would have found these additional claims time-barred as well. The district court's omission of these claims from its charge to the jury did not constitute plain error. Given the facts upon which the jury based its verdict on Osei-Afriyie's emotional distress claim, it would have also been compelled to find against his other purported claims on statute of limitations grounds.

We must next examine the district court's dismissal of that portion of Osei-Afriyie's post-trial motion for reconsideration insofar as it concerned his own claims. The district court dismissed his motion for reconsideration because he did not either order a

transcript or certify that there was good cause why a transcript was unnecessary, as is required under Local Rule 20(e) of the United States District Court for the Eastern District of Pennsylvania. We review the district court's dismissal of the motion for abuse of discretion. *See Oelenschlager,* 845 F.2d at 1183 (utilizing abuse of discretion standard to review district court's Local Rule 20(e) dismissal of post-trial motion); *Hewlett v. Davis,* 844 F.2d 109, 114 (3d Cir. 1988) (same).

We noted in *Smith* that "the judges of the district court deliberately framed Rule 20(e) in mandatory terms." *Smith,* 845 F.2d at 1184. Osei-Afriyie maintains on appeal that he did not have to provide the district court with a transcript of proceedings because his post-trial motion

contained enough relevant material appended to it for the district court to decide the motion on its merits. Rule 20(e) does not require the movant to provide a transcript in all cases. Instead, the movant either must provide a transcript or "file a verified motion showing good cause to be excused" from filing a transcript.

If Osei-Afriyie did not believe a transcript was necessary for the district court to rule upon his post-trial motion, he should have filed a verified motion showing good cause to be excused from filing a transcript. Instead, Osei-Afriyie did nothing. As we wrote in *Smith*, since our Court insists upon the faithful adherence to our rules, we cannot fault a district court judge who applied the same approach." *Id.* We hold in these

circumstances that the district court did not abuse its discretion in dismissing Osei-Afriyie's post trial motion for lack of prosecution.

Accordingly, we cannot examine the particular merits of the three arguments in support of a new trial that Osei-Afriyie set forth in his motion for reconsideration. However, we have already considered similar arguments that Osei-Afriyie makes on appeal because, as we wrote in *Hewlett,* 844 F.2d at 115, n.3, "[o]jections to [jury instructions given] at trial are ripe for review upon appeal from a final order whether or not they are raised on motion for a new trial."

Finally, we must examine Osei-Afriyie's argument that the district judge should have recused himself due to "unfairness" and "prejudice." A federal

statute, 28 U.S.C.A. § 455(b)(1) (West supp. 1991), provides that a judge "shall . . . disqualify himself . . . [w]here he has a personal bias or prejudice concerning a party . . . ." As noted earlier, since Osei-Afriyie failed to move for recusal while this matter was before the district court, we once again review for plain error. *See Schreiber,* 599 f.2d at 536.

Osei-Afriyie's claim of "unfairness" is based upon the district judge's unwillingness to hear argument, after the jury was sent off to deliberate, on Pennsylvania cases holding that the inability to discover certain causes of action or the concealment or misrepresentation of certain causes of action tolls the applicable statutes of limitations. Following the jury's verdict

the next morning, the district judge allowed Osei-Afriyie to present his legal argument.

Osei-Afriyie has failed to point to any "unfairness" that required the district judge to recuse. As noted earlier, Osei-Afriyie did not advance a timely objection to the district judge's jury instructions nor did he suggest on the record before the jury retired that the district judge give an instruction on the so-called "discovery rule" or with respect to concealment and misrepresentation. In fact, the district judge did charge the jury, prior to the start of its deliberations, as follows:

Ladies and gentlemen of the jury, if you find that there was anything hidden from the plaintiff, that in other words, he could not discover this then the

statute did not begin to run. His position is that it was hidden-he claims that Dr. Stull conducted studies of the use of quinoidine {sic} and-if you find that was hidden from him and he could not discover it, the statute could not begin to run.

App. at 42-43. We conclude that the instructions the district judge gave were not so problematic as to evidence any "unfairness" that shows that it was plain error for the district judge not to have recused himself in this suit.

Osei-Afriyie also contends that the district judge should have recused due to "prejudice" evidenced by the district judge's comments to him following the return of the jury's verdict. Following the verdict, the district judge allowed Osei-Afriyie wide latitude to address how

he believed the district judge erred in his instructions to the jury. During the colloquy between Osei-Afriyie and the district judge, the district judge informed Osei-Afriyie that his presentation of his and his children's cases would have been aided by the assistance of a lawyer. The district judge also inquired as to what damages Osei-Afriyie would have hoped to prove, since both children recovered fully without complication from their bouts with malaria and since the children were not directly identified in the article that Dr. Stull wrote.

Having reviewed the entire record of this brief trial, we disagree with Osei-Afriyie's charge that the district judge was prejudiced against him. Before the return of the jury's verdict, the district

judge never disparaged Osei-Afriyie's *pro se* status nor did the judge comment upon the damages that might be available to him and his children. Instead, the record shows that the district judge was, if anything, extremely indulgent of Osei-Afriyie's naivete in the law. As an example of this indulgence, we note that the district judge allowed Osei-Afriyie, over the repeated objections of the attorney for the hospital and Dr. Stull, to tell the jury in his closing argument his version of facts that had not been placed in evidence by his sole witness at trial.

The record shows that the district judge was scrupulously fair to Osei-Afriyie. The district judge's post-verdict comments do not seem to us to evidence any prejudice whatsoever.

Instead, as our disposition of the children's claims has shown, the district judge, in commenting that Osei-Afriyie could have benefitted from trained legal assistance, was merely stating what has proven to be a true proposition; in commenting that any damages available on this complaint seemed minimal, the district judge appears to have been stating the legal truism that if someone suffers a battery without resulting injury all that person can recover is a nominal amount. *See* Restatement (Second) of Torts § 907 comment a (1977).

For these reasons, we hold that the district judge did not commit plain error in failing to recuse.

V.

For the reasons set forth above, we will affirm the district court's judgment

to the extent that the jury found Osei-Afriyie's claims in his own right to be time-barred. We also will affirm the district court's dismissal of Osei-Afriyie's post-trial motion for lack of prosecution and its decision not to recuse from the case despite the reasons that Osei-Afriyie asserts for the first time on appeal. However, we will vacate the district court's judgment to the extent that it adjudicated the children's claims and will remand their claims for further proceedings consistent with this opinion.

A True Copy:

Test:

Clerk of the United Court of

Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1642

JENNIFFER AND MONICA OSEI-AFRIYIE,
minors,Individually, by their
parent, FRANCIS OSEI-AFRIYIE,
and in His Own RIGHT,
Appellants

v.

THE MEDICAL COLLEGE OF PENNSYLVANIA
and STULL TERRENCE LEE, M.D.
Appellees

On Appeal from the United States Court
for the eastern District of Pennsylvania
(D.C. Civil Action No. 90-01566)

Present: SLOVITER, Chief Judge,
HUTCHINSON and ALITO, Circuit Judges

JUDGEMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit Rule 12(6) February 14,

1991.

On consideration whereof, it is now ordered and adjucated by this Court that the judgement of the District court entered on July 17, 1990 and the order entered on August 21, 1990, be, and the same are hereby affirmed insofar as the jury found Osei-Afriyie's claims in his own right time-barred and insofar as Osei-Afriyie's post-decision motion dismissed for lack of prosecution and the said District Court's decision not to recuse itself from the case; and, vacated insofar as the said District Court's judgement adjudicated the children's claims and these claims are remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST

July 1, 1991 **Chief Deputy Clerk**

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.90-1642

OSEI-AFRIYIE, et al., appellants

vs.

MEDICAL COLLEGE OF PA. et al

It is ORDERED that the motion for stay of mandate is **DENIED** because no substantive right of the applicant will be affected by failure to grant the stay of mandate. This is without prejudice to the applicant's right to file a timely petition for a writ of certiorari.

/s/

William D. Hutchison
Circuit Judge

Dated: Aug. 20 1991.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1642

Re: OSEI-Afriyie et al, Appellants v. Medical College PA et al

Present: SLOVITER, Chief Judge, HUTCHINSON and ALITO, Circuit Judges

1. Appellant' Motion For The Court To Correct Misstatements In The Court's Opinion.

2. For your information: Opinion and judgement were filed July 1, 1991 in this appeal. An Order was filed July 26, 1991, denying the appellant's Petition for Rehearing in Banc.

3. Appellees Motion To Strike Appellant's Motion To Correct The Court's Written Opinion.

/s/

Barbara Jacobson
Deputy Clerk - Dial 597-8465

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1642

Re: OSEI-Afriyie et al, Appellants v. Medical College PA et al

ORDER

Appellant's motion is denied and appellees' motion to strike is dismissed as moot.

By the Court,

/s/

William D. Hutchison
Circuit Judge

Dated: Aug. 6, 1991

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JENNIFFER AND MONICA OSEI-AFRIYIE, minors Individually, by their parent, FRANCIS OSEI-AFRIYIE, and in His Own RIGHT,	FILED AUG.20, 1990
	C.A.NO. 90-1566
VS.	
THE MEDICAL COLLEGE OF PENNSYLVANIA and STULL TERRENCE LEE, M.D.	

WEINER, J. AUG.20,1990

MEMORANDUM OPINION AND ORDER

On March 7, 1990, plaintiff Francis Osei-Afriyie brought this action on behalf of his children, Jennifer and Monica Osei-Afriyie, and in his own right. Named as defendants were the Medical College of Pennsylvania and Stull Terrence Lee, M.D. The complaint included claims for assault and battery, negligence, lack of informed

consent, wrogful disclosure of confidential information, invasion of privacy and intentional inflictional of emotional distress. Defendants raised, as an affirmative defense, that all the claims were barred by the applicable statute of limitation. The court, sitting with a jury, trifurcated the trial, hearing the statute of limitation issue first. The jury returned a verdict finding that the claims were barred, the cause of action having arose on July 13, 1985, while suit was not brought until March 7, 1990. presently, before the court is the plaintiffs' post-trial motion, asking the court''to reconsider its decision to instruct the jury on medical malpractice as the basis of suit and also on instructions on statute of limitations''. For the reasons which follow, the motion

must be dismissed for lack of prosecution.

Rule 20(e) of the Local Rules of the United States District Courtfor the Eastern District of Pennsylvania provides:

> Within ten (10) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trialby a writing delivered to the Court Reporter Coordinator, or (b) file a verified motion showing good cause to be excused from the requirement. nUnless a transcript is thus ordered, or the movant is excused from obtaining a transcript, the post trial motion must be dismessed for lack of prosecution.

In the case sub judice, defense counsel filed his post-trial motions on July 26, 1990. Under the requirements of Rule 20(e), it was encumbent upon plaintiffs to either order Notes of Testimony or file a verified motion for excusal by no later than August 9, 1990 (ten weekdays excluding weekends and holidays). The Court Reporter Coordinator has informed

the court that, to date , plaintiffs have neither ordered the Notes of Testomony, nor filed a verified motion for excusal. Consequently, the post-trial motions must be dismissed for lack of prosecution. See Smith v. Oelensschlager, 845 F.2d 1182(3d Cir. 1988).

While dismissal of this motion may be a harsh sanction, we believe dismissal is necessary in this case. The Rules of court are promulgated to facilitate the court's acquisition of the materials necessary for the efficient processing of the matters on its docket. _Hewlett v. Davis, 844 F.2d 109, 114 (3d. Cir. 1988). Failure to abide by these rules only causes an increase in time and effort on thev part of the court. See Kushner v. Winterthur Swiss Ins.Co., 620 F.2d 404 (3d Cir. 1980). It certainly is not the responsibility of the court to

make parties comply with these rules. Further the United States Court of Appeals for the Third Circuit has consistently recignized the authority of a district court to dismiss post-trial motions for failure to comply ewith the mandatory language of Local Rule 20 (e). Frangos v. Doering Equipment Corporation, 860 F.2d 70(3d 1988); Hewlett, supra; Smith, supra. Having arrived at the time for disposition of plaintiffs' post-trial motions lacking the necessary materials to rule on the motion, and having had no notice, by motion or otherwise, that the party wished to be excused from ordering the transcript, we dismiss the post -trial motion for lack of prosecution.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JENNIFFER AND MONICA OSEI-AFRIYIE, minors Individually, by their parent, FRANCIS OSEI-AFRIYIE, and in His Own RIGHT,	.	FILED AUG.20, 1990
		C.A. NO. 90-1566
VS.		
THE MEDICAL COLLEGE OF PENNSYLVANIA and STULL TERRENCE LEE, M.D.		

ORDER

The post-trial motion of the plaintiffs, Jennifer and Monica Osei-Afriyie, minors, individually, by their parent, Francis Osei-Afriyie, and in his own right, are DENIED for lack of prosecution.

IT IS SO ORDERED.

/s/

CHARLES R. WEINER

ENTERED:8:21:90

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

PRETRIAL ORDER AND REPORT

DATE PRETRIAL HELD: 6/5/90 NO. 90-1566

CASE CAPTION: OSEI-AFRIYIE V. MCP, ET. AL

1.TRIAL COUNSEL FOR PLAINTIFF: PRO SE;
DEFENDANT: ALEXANDER FERRANTE

2.STATUS OF CASE: PLAINTIFF DEMANDS $1 M.

3.TRIAL DATE: JULY 16, 1990 - BIFURCATED

4.JURY

PRETRIAL MEMOS. AND POINTS FOR CHARGE OR PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PLAINTIFF: 6/18/90 DEFENDANT: 6/25/90

NOTE: ALL DOCUMENTS, PHOTOS, ETC. ARE TO BE MARKED BEFORE TRIAL AND COPY GIVEN TO OPPONENT(S), OR OPPONENTS BE ALLOWED TO COPY THEM.

POINTS FOR CHARGE ARE TO BE SUBMITTED IN DUPLICATE - EACH POINT ON A SEPARATE PAGE.

Copy forwarded to counsel listed above.
SO ORDERED:

ENTERED: 6:7:90 /s/

CHARLES R. WEINER

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JENNIFER AND MONICA OSEI-AFRIYIE, et al	.	
Plaintiffs,	.	Civil Action No. 90-388 LON
vs.	.	
MEDICAL COLLEGE OF PENNSYLVANIA, et al	.	
Defendants.	.	ORDER

1. Before the Court are several motions including: a motion by the defendants to strike plaintiffs' amended complaint, a motion by the defendants to dismiss the amended complaint on the ground that the Court lacks personal jurisdiction over the Defendants, a motion by the defendants for summary judgement on the grounds of res judicata and collateral estoppel and a motion by the Plaintiffs for default judgement based upon Defendants' failure

to respond to the amended complaint within ten days after it was served on them. All of the motions have been fully briefed by the parties and the Court finds that resolution of the motions is appropriate without oral argument.

2. The Plaintiffs commenced this action by filing a complaint on July 26, 1990. Docket Item (''D.I.'') 1. The original complaint alleged that Defendants Medical College of Pennsylvania (''College'') and Terrence Lee Stull, M.D. (''Dr. Stull'') violated the Plaintiffs' civil and constitutional rights, committed fraud and concealment upon the Plaintiffs, invaded the Plaintiffs' privacy, treated two of the Plaintiffs without informed consent, used two of the Plaintiffs for medical experimentation without their consent or the consent of their parents, committed

negligence and medical malpractice, intentionally inflicted emotional distress upon the Plaintiffs and wrongfully discharged confidential information.

3. The Plaintiffs' complaint arises from quinidine treatment that Jennifer and Monica Osei-Afriyie received at the College after Dr. Stull diagnosed the girls as having malaria. The treatment occured between July 26 and July 29, 1985. The Plaintiffs also complain that the results of the successful treatment of Jennifer and Monica Osei-Afriyie were wrongfully reported in the May, 1987, issue of the Journal of Infectious Diseases and in the July, 1989, issue of the the New England Journal of Medicine.

4. In their answer to the complaint, the College and Dr. Stull denied the

allegations and asserted several affirmative defenses including res judicata and collateral estoppel. D.I.5. Three exhibits are attached to the answer. Exhibit A is a copy of the complaint the Plaintiffs filed in the United States District Court for the Eastern District of Pennsylvania on March 1, 1990. Exhibit B is a certified copy of the Docket sheet from that case. Exhibit C is a copy of the judgement in favor of the College and Dr. Stull which was entered in accordance with the jury's verdict form in that case.

5. On September 7, 1990, the Plaintiffs filed a motion to amend their complaint. D.I. 7. The Plaintiffs filed an ''answer to the defendants' motion for summary judgement based on res judicata and collateral estoppel'' on September 10, 1990. D.I. 8. The College and Dr. Stull

did not file a motion for summary judgement until October 4, 1990. D.I. 11.

6. The Court held a conference on October 4, 1990. Following the conference, the Court ordered that the Plaintiffs file their amended complaint by November 5, 1990. The Defendants were ordered to supplement their motion for summary judgement by November 19, 1990. The Plaintiffs were ordered to respond to the supplemented motion on or before December 3, 1990. The Defendants' rebuttal brief was to be filed by December 17, 1990.

7. The Plaintiffs' amended complaint named an additional Defendant, Thad Padua, M.D. (Dr. Padua''). Apparently, Dr. Padua was a resident at the College when Jennifer and Monica ware treated in 1985. On November 16, 1990, the Defendants filed a motion to dismiss the complaint on the

ground of lack of personal jurisdiction over the Defendants, D.I. 18, a motion to stike the Plaintiffs' amended complaint, D.I. 20, and a supplement to their motion for summary judgement., D.I. 21.

8. On December 3, 1990, the Plaintiffs filed a memorandum in opposition to the Defendants' motion to strike the amended complaint. D.I. 23. In the same document, the Plaintiffs also moved the Court to enter a default judgement in favor of the Plaintiffs on the ground that the defendants had failed to answer the amended complaint within ten days as required by Federal Rule of Civil Procedure 15(a). On December 3, 1990, the Plaintiffs responded to the Defendants' motion for summary judgement, D.I. 24, and to the Defendants' motion to dismiss, D.I. 25.

9. The Defendants filed a ''supplemental memorandum of law in response to plaintiffs' response to defendants' motion to dismiss for lack of jurisdiction'' on December 11, 1990. On that date, the Defendants also filed a rebuttal brief in support for their motion for summary judgement. D.I. 27.

10. On December 19,1990, the Plaintiff filed a''supplemental response to Defendants... supplemental memorandum of law to support their motion to dismiss for lack of jurisdiction.'' D.I. 28. With the exception of a substitution of affidavits by the defendants, D.I. 29, no other documents have been added to the docket.

11. The Court will begin by considering the Plaintiffs' motion for default judgement.D.I. 23. Federal Rule of Civil Procedure 15(a) provides in pertinent

part: ''A party shall plead in response to an amended pleading... within 10 days after the service of the amended pleading...unless the court otherwise orders'' Fed.R.Civ.P. 15(a) (emphasis added).

12. In this case, the court ordered the Defendants to respond to the amended pleading on or before November 19, 1991. Therefore, the ten days discussed in Rule 15 is not applicable. The Defendants filed all of their response to the Plaintiffs' amended complaint on November 16, 1991. The responses were timely. Therefore, the Plaintiffs' motion for a default judgement will be denied.

13. The Court will next consider the Defendants' motion to strike the amended complaint or in the alternative provide a more definite statement. D.I. 20. The

Defendants ask that the Court strike the amended complaint on the grounds that it contains paragraphs which are not concise, paragraphs which are immaterial, paragraphs which are confusing and paragraphs which contain multiple allegations. The Defendants assert the amended complaint as a whole is filled with redundancies and is overbroad. In response, the Plaintiffs argue that the amended complaint is appropriate and have attempted to correct some of the problems raised by the Defendants. D.I. 23 at 6-8.

14. The Court finds that the amended complaint is lengthy, confusing, vague in places and contains extraneous material. However, the amended complaint does serve the function of giving the Defendants notice of the conduct the Plaintiuffs are complaining about. Given the Plaintiffs'

pro se, the Court will not strike the amended complaint. The Court believes that requiring the Plaintiffs to provide a more definite statement wuold do little to clarify the issues in this case and would only delay the disposition of the case on its merits. Therefore, the Court will not require the Plaintiffs to file a more definite statement.

15. The next issue the Court considers is the Defendants' motion to dismiss on the ground that this Court lacks personal jurisdiction over the Defendants. D.I. 19. The Court begins its analysis by noting that this defense is not available to the College and Dr. Stull. When the College and Dr. Stull answered the original complaint, they asserted several affirmative defenses but failed to assert that this Court lacked personal

jurisdiction over them. D.I. 5. Subsequently, the College and Dr. Stull filed a motion for summary judgement in this case, again without asserting that the Court lacked personal jurisdiction. D.I. 11. The Court finds that the College and Dr. Stull have waived the defense of lack of personal jurisdiction. See Fed. R.Civ.P. 12(h)(1); Meyers v. American Dental Ass'n, 695 F.2d 716, 721 (3d Cir. 1982), cert denied U.S. 1106 (1983).

16. Dr. Padua, however, did not waive this defense. Dr. Padua was not named as a defendant in the original complaint. Before filing any other responsive pleading, Dr. Padua moved for dismissal on the ground of lack of personal jurisdiction. Dr. Padua is not a resident of Delaware. Therefore, the Court must determine whether the exercise of personal jurisdiction over Dr. Padua is appropriate

under the provisions of the Delaware long-arm statute. 10 Del. Section 3104. Max DaetwylerCorp. v. R.Meyer, 762 F. 2d 290, 295-96 (3d cir.),cert. denied, 474 U.S. 980 (198).

17. In determining whether to dismiss for lack of personal jurisdiction, the Court must follow a two-step process. First, the Court must determine whether or not the conduct of the defendant falls within one of the provisions of the long-arm statute. If the defendant's conduct is within the statute, the Court must determine whether the exercise of jurisdiction over a particular defendant violates due process interests.

Blue Ball Properties v.McClain, 658 F.Supp. 1310, 1315 (D.Del.1987).

18. The Delaware statute provides in pertinent part:

c. As to a cause of action brought by a person arising any of the acts enumerated in this section, a Court may exercise

personal jurisdiction over any non-resident, or his personal representative, who in person or through an agent:

(1) Transacts any business or performs any character of work or service in the State;

(2) Contracts to supply services or things in this State;

(3) Causes tortious injury in the State by act of omission in this state;

(4) Causes tortious injury in this State or outside this State if he regularly does or solicits business, engages in any persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;

(5) Has an interest in, uses or possesses real property in the State; or

(6) Contracts to insure or act as surety for, or on, any person, property, risk contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing. 10 Del. Section 3104(c).

19. When personal jurisdiction is challenged by a motion to dismiss, the plaintiff has the initial burden of demonstrating a basis for long -arm

jurisdiction. If a court resolves the issue of personal jurisdiction solely upon written submissions, then all of the plaintiff's allegations supporting jurisdiction must be presumed to be true and all factual disputes must be resolved in favor of the plaintiff. Blue Ball Properties, 658 F.Supp. at 1314-15.

20. The Plaintiffs only allegation linking Dr. Padua to Delaware are that the published articles were circulated in Delaware and that the Plaintiffs now reside in Delaware. D.I. 28 at 6-7. It is undisputed that the medical treatment took place in Pennsylvania and the Plaintiffs were not Delaware residents at time. Id. Dr. Padua has submitted an affidavit which states that he does not: maintain a place of business in Delaware; solicit business in Delaware; own any property in Delaware;

derive revenue from services or things in Delaware; or provide medical services in Delaware. D.I. 29. The Plaintiffs do not contradict these assertions by Dr. Padua.

21. The Court finds that the Plaintiffs do not place Dr. Padua within any of the provisions of the Delaware Statute. The fact that copies of the journals would have been circulated in Delaware is too tenuous a link with Delaware to constitute an act within the state under subsection (c)(3). Even if subsection (c)(3) were satisfied, exercising jurisdiction in this case would violate due process concerns because Plaintiffs have not established what would be considered minimum contacts with Delaware. See International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). The Plaintiffs have failed to make a prima facie showing that the court can exert

personal jurisdiction over Dr. Padua.[1] Therefore, the Court will grant Dr. Padua's motion to dismiss the Plaintiffs' complaint against him for lack of personal jurisdiction.

22. Finally, the Court turns to the Defendants, motion for summary judgement on the grounds of res judicata and collateral estoppel. A court shall enter summary judgement in favor of a party if''the pleadings, depositions, answers to interrogatories, and admissions on file,

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[1] The Court notes that the Plaintiffs vigorously argue that the Court can exercise jurisdiction in this case. The Plaintiffs appear to be confusing subject matter jurisdiction and service of process rules with personal jurisdiction.

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgement as a matter of law.'' Fed.R.Civ.P. 56(c).

23. Res judicata or claim preclusion permits ''a final judgement upon the merits rendered by a couty of competent jurisdiction [to] be raised as an absolute bar to the maintenance of a second suit in a different court upon the same matter by the same party or his privies.'' Neoplan USA Corp.v. Taylor, 604 F.Supp. 1540, 1544 (D.Del 1985) (quoting Epstein v. Chatham Park, Inc., Del.Super., 153 A.2d 180, 184 (1959). Claim preclusion also serves to bar claims which were not brought in the previous litigation but which arise out of the same transaction which formed the basis of that litigation. Neoplan, 604

F.Supp. at 1544. In order for a party to invoke the doctrine of res judicata, both the parties in the present litigation must have been present in the prior litigation. Id. at 1543 n.4.

24. To prove res judicata applies in pending litigation, a party must show that : there has been a final judgement on the merits rendered by a court of competent jurisdiction in the absence of fraud or collusion; the same transaction forms the basis for the prior and pending suits; and the claim for relief could have been properly presented in the prior action. Id. at 1544.

25. The court has examined the amended complaint,D.I. 15, and the complaint that the Plaintiffs filed in the Eastern District of Pennsylvania (''the Pennsylvania complaint''), D.I. 5, Exhibit

A. The Plaintiffs in the complaintiffs are the same. The College and Dr. Stull were named as Defendants in the Pennsylvania complaint. Therefore, these two Defendants can theoretically assert res judicata as a defense.

26. The Court finds that the action in Pennsylvania culminated in a two day jury trial. The trial was bifurcated; initially the jury was asked to determine if the statute of limitations had run on each of the Plaintiffs' claims. D.I. 21, Exhibit A. The jury returned a verdict in favor of the College and Dr. Stull. D.I. 5, Exhibits B, C. The Court believes that the United States District Court for the Eastern District of Pennsylvania is a court which was competent to hear these claims and the parties have not suggested otherwise.

27. The Plaintiffs argue that was not final and on the merits. In support of this argument the Plaintiffs the plaintiffs assert that the jury heard only the statute of limitations evidence and no other evidence in the case, the judge came to the trial ''with his own agenda'', the judge failed to submit the Plaintiffs' civil rights claims to the jury, the judge erroneously determined that Dr. Stull was not an author of the 1989 article and the judge did not give the jury adequate instructions on the law.

28. The Court finds that the Plaintiffs' arguments are not persuasive. They do not allege fraud or collusion. Nor do these assertions suggest that the decision was not final or not on the merits. The jury's determination that the Plaintiffs were barred by the statute of limitations is a

final decision on the merits. The judge's decision that certain claims were not meritorious as a matter of law is also a final decision on the merits.[2] Therefore,

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[2]If the Plaintiffs believe the judge or jury erred, the an appeal of the Pennsylvania case to the Court of Appeals for the Third Circuit is the appropriate procedure to use in addressing those issues. The Court notes that the Plaintiffs did file such an appeal on August 10, 1990. D.I. 5, Exhibit C.

The ''pendency of an appeal does not suspend the operation of an otherwise final judgement as res judicata or collateral estoppeal, unless the appeal removes the entire case to the appellate court and constitutes a proceedings de

the College and Dr. Stull have shown that first element of res judicat is satisfied.

29. The Court has compared the amended complaint to the Pennsylvania complaint and finds that all of the allegations in the amended complaint arise from the same transaction which were the basis of the Pennsylvania complaint. Both complaints

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novo.'' 1B Morre, J. Lucas & T. Courrier, Moore's Federal Practice § 0.416[3] at 521-22 (2nd ed. 1991). Because the plaintiffs are not entitled to a de novo proceeding before the Court of Appeals for the Third Circuit, the pendency of the appeal does not destroy the res judicata and collateral estoppel effects of the prior judgement. See also Hunt v. Liberty Lobby, Inc.,707 F.2d 1493, 1497 (D.C. Cir. 1983).

allege various causes of action which are based upon the 1985 hospitalization and the 1987 and 1989 publications. This satisfies the second element necessary for invoking the defense of res judicata.

30. In the amended complaint the Plaintiffs have set out various theories of recovery in more detail that they did in the the Pennsylvania complaint. For example, the Pennsylvania complaint alleges only that the Plaintiffs ' civil rights were violated, D.I. 5, Exhibit A at 1-2. In spite of the differences in detail, the Court finds that all the claims in the amended complaint were brought or could have been brought in the Pennsylvania case. Therefore, the element required for the application of the res judicata defense is satisfied. The College and Dr. Stull are entitled to summary

judgement on the ground of res judicata.

31. Dr. Padua cannot invoke the doctrine of res judicata as a defense because he was not a party to the Pennsylvania action. This is not material because the court has already determined that it cannot exert personal jurisdiction over Dr. Padua. For the sake of completeness, the Court will consider whether Dr. Padua could invoke the defense of collateral estoppel.

32. Collateral estoppel or issue preclusion involves '' 'foreclosing relitigation of a matter that has been litigated and decided.' ''Neoplan, 604 F.Supp. at 1543 (quoting Migra v. Warren City School District, 465 U.S. 75, 77 n.1 (1984). A party can raise issue preclusion as a defense without having been a party in the previous action. In order to

successfully invoke issue preclusion, Dr. Padua must show that three requirements are met: the issues in this action must be the same as those in the Pennsylvania action, the issues must have been fully litigated in the Pennsylvania action and resolution of the issues must have been necessary to the outcome of the prior valid judgement. Neoplan, 640 S.Supp. at 1546.

33. Although the claims in the amended complaint are articulated in more detail that in the Pennsylvania complaint, the claims are essentially identical. This satisfies the first requirement. As the Court has previously noted, the decision in the Pennsylvania case was valid, free of collusion or fraud, final and on the merits. This satisfies the second requirement. Finally, the resolution of

all the Plaintiffs' claims was necessary to render judgement in favor of the College and Dr. Stull. Therefore, the third requirement is also satisfied. Dr. Padua, had this Court exerted personal jurisdiction over him, would have been entitled to summary judgement on the ground of collateral estoppel.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Plaintiffs, motion for a default judgement against the Defendants is denied.

2. The Defendants' motion to strike the amended complaint or in the alternative for a more definite statement is denied.

3. Dr. Padua's motion to dismiss the amended complaint on the ground of lack of personal jurisdiction is granted.

4. The Medical College of Pennsylvania and Dr. Stull's motion to dismiss is

denied.

5. The Medical College and Dr. Stull's motion for summary judgement on the ground of res judicata is granted.

6:18:91 /s/

Joseph J. Longobardi, D.J.

APPENDIX D

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1642

JENNIFER and MONICA OSEI-AFRIYIE, minors,
Individually, by their parent,
FRANCIS OSEI-Afriyie,
and in his own right,
Appellants,

v.

THE MEDICAL COLLEGE OF PENNSYLVANIA
and STULL, TERRENCE LEE, M.D.,
Appellees.

(D.C. Civil Action No. 90-01566)

SUR PETITION FOR REHEAHING

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANNSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and ALITO, Circuit Judges

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision and to all the other available judges of the circuit

in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/

William D. Hutchison
Circuit Judge

Dated: JUL. 26 1991.

APPENDIX E

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE THIRD CIRCUIT
October 7, 1991

No. 91-3474

JENNIFER and MONICA OSEI-AFRIYIE, minors, Individually, by their parent, FRANCIS OSEI-Afriyie, Appellants,
v.
THE MEDICAL COLLEGE OF PENNSYLVANIA, et al.
(Delaware Civil No. 90-00388)

PRESENT: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANNSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD ALITO and ROTH, Circuit Judges.

Suggestion by appellant, Francis Osei-Afriyie, for in banc hearing, with statement of prior case in this Court,

/s/
Bobbi Weaver
Deputy Clerk

Appellees' brief due 10-23-91.

ORDER

The foregoing Motion is denied

By the Court,

/s/

D.K. Sloviter
Chief Judge

Dated: October 16, 1991.

APPENDIX F

EXCERPT OF TRANSCRIPT FROM THE PROCEEDINGS IN THE DISTRICT COURT EASTERN DISTRICT OF PENNSYLVANIA

THE COURT: Let's go pass getting ready and finish. Is that a lawyer's two minutes?

MR. FERRANTE: I will do a two-minute drill... He published an article in the Journal of Infectious Disease. What he did that Mr. Osei- Afriyie said was a breach of his and the children's privacy--one child is sibling A and B and they arrive from West Africa. No name is used or location, nothing to identify that these were the children in the study.

Mr. Osei-Afriyie made a comment that this was a research or investigation or project. It was not.

Mr. Osei-Afriyie said I don't want the children involved in the research project

and Dr. Stull said, fine. The consent forms was for the CDC to get FDA approval and you have to fill out a long questionnaire and that information is given to the FDA to get approval for the drug. That is not the case here and no one in the courtroom is going to testify to that here.

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THE COURT: I will be glad to hear you tommorrow morning at 9:30. I will hear any argument you want to make.

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MR. OSEI-AFRIYIE: Your Honor, you told me yesterday you would give an opportutity to speak.

THE COURT: I will be glad to hear you even after the verdict is over. I can correct the verdict if it needs correcting and I can take whatever action is necessary. We will hear from the jury now.

MR. OSEI-AFRIYIE: Would it be possible for you to listern to me before the jury actually renders its verdict?

THE COURT: After the jury renders its verdict I will be glad to listen to you.

MR. OSEI-AFRIYIE: What I am trying to say is you told me yesterday to go and get the law. You said discovery is important.

THE COURT: I will be glad to hear you on that.

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THE COURT: ... There was a miscount in the in the operating room. What had happened in that case is that person became ill and that illness was not discovered until sometime later and it was determined that the sponge was left in . They took x-rays. That's different. There he had no wat of knowing. In your case you were in the hospital or they were in the hospital a

period of four or five days in 1985.

Now when did you discover that the illness that you are complaining of took place?

MR. OSEI-AFRIYIE: September, 1989 when I saw that my children were used as subjects.

THE COURT: Were they ill after they left the hospital--had they been cured ?

MR. OSEI-AFRIYIE: I did not know.

THE COURT: Did you take them to another doctor?

MR. OSEI-AFRIYIE: Yes.

THE COURT: Did that doctor say that they were not cured properly?

MR. OSEI-AFRIYIE: Your Honor, I don't think that's what the case is about.

THE COURT: If you are talking about malpractice that's the case you read to me you tell me where the malpractice is.

MR. OSEI-AFRIYIE: I am alleging two things but you have decided not to talk about civil rights. What Iam trying to say is this --the doctor and the hospital and in their answeres to my complaint said Dr. Stull never conducted any test in the use of Quinidine. They concealed that information from me and I discovered the fact that they used my children for research.

THE COURT: What damages have you sufferedf? I am looking through your eyes now. What damages have you suffered? Are your children ill, have you spent more money to cure them, have you taken more steps than you would normally take?

MR. OSEI-AFRIYIE: Your Honor, when I did not have the time and now you say the statute of limitations was against me-- .

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The Court: What did you tell the jury that you have suffered damages? If your children were not cured or you had to go to another doctor that would be a basis for it. What did the doctor do or the hospital do that caused you damages?

MR. OSEI-AFRIYIR: They used my children for research. The law is clear that you cannot give an investigational drug to a patient without the patient's consent.

THE COURT: What is the damages the jury would bring back to compensate you for that?

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MR. OSEI-AFRIYIE: ... What I am trying to establish is that the civil rights of the children were violated and the Court, Your Honor, with due respect should have mentioned that to the jury, but you say

that this was only a malpractice case.

THE COURT: No, we also let the jury decide whether any of your rights were violated by publishing the material.

MR. OSEI-AFRIYIE: Invasion of privacy is one thing. This is the decision to use the children as human research subjects. It is a violation of their rights. I will repeat you didn't mention that to the jury.

THE COURT: You file a motion.

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MR. FERRANTE: With respect to the discovery rule Idon't think it's applicable. I think the statute started July 26th or 25th, 1985...

With respect to the child's civil rights there is no breach of any federal civil rights and there is no connection between the hospital and Dr. Stull with the state or federal agency and there is no

violation of the state right which would be before the Court.

APPENDIX G

EXCERPT OF DEPOSITION STATEMENT
(GRACE ATEA AMPOFOH)

(FERRANTE) Q. Do you recall telling the resident that Jennifer was shaking or having convulsions for two or three minutes that morning?

(AMPOFO) A. No I said Jennifer shivered for about three seconds, not minutes. I would not say it's convulsion.

Q. And you know how to spot a convulsion?

A. How?

Q. Because you are a nurse, you know what a convulsion is?

A. Yes.

Q. So as far as you know, she didn't have a convulsion?

A. No.

Q. You think she was just shivering?

A. Shivering.

Q. Now do you recall telling a resident that Jennifer's stool was floating?

A. What did you say floating?

Q. Floating on top of water.

A No.

Q. Do you recall telling a resident that at about 12 midnight on the 25th , Jennifer felt very hot and had had diarrhea?

A. No.

APPENDIX H

EXCERPT OF PETITIONER'S APPENDIX

OPEN STUDY OF THE EFFICACY AND SAFETY OF QUINIDINE IN THE TREATMENT OF SEVERE MALARIA

The purpose of this study is to evaluate the safety and effectiveness of a drug, quinidine, in the treatment of severe malaria. Quinidine has been approved for use in the treatement of disturbances of the rythm for the heart for many years, but its use in the treatment of malaria is considered investigational by the U.S. Food and Drug Administration (FDA). The Centers for Disease Control (CDC), in cooperation with the Medical College of Pennsylvania, is studying the use of quinidine for the treatment of severe malaria under a protocol on file with the FDA.

The CDC, however, can assume no medical

responsibility for your child. If your child suffers physical injury caused by your participation in this study, The Medical College of Pennsylvania will (a) provide necessary medical treatment for the injury, and (b) assume any costs for such treatment which (i) are not reimbursable to you under any existing public or private health care or insurance program and (ii) are in addition to the normal costs of medical treatment for a condition such as yours. We will not provide other compensation to you.

Quinidine is used for therapy because the more accepted drug, quinine, is not readily available in hospitals in the United States. While quinidine may prove beneficial in treating the malaria, it also has certain risks such as lowering the blood pressure and causing

disturbances of the rythm of the heart. These side effects wil be watched for closely in the Intensive Care Unit (ICU) of the hospital. Other side-effects, while they may be uncomfortable, are not serious. These include nausea, vomiting, headache, dizziness, and ringing in the ears.

I understand that I can choose to refuse or stop the treatment with quinidine at any time. Information regarding my child will be forwarded to the CDC in Atlanta, who will analyze the information along with information from other patients. This information may later be published, but the identity of my child will remain strictly confidential.

The above information has been discussed with me by Dr. Terrence Stull, and I consent to have my child participate in

the study. If you have any questions during the cousre of the study please contact Dr. Stull Terrence Stull, M.D. (telephone 842-7132).

---------- 072685 ---------
Signature of parent date

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Terrence Stull, M.D. date

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OSE1 AFRIYIE, JENNIFER FNCMR

253 W. HANSBERRY ST.

PHILA PA 19144

02 YR 2/8/83 ER 7/25/85

MR 425715 STULL 507590

AILIFE INS 33387/F

RELEASE OF INFORMATION

My child has been treated for severe malaria during emergency therapy with quinidine. Quinidine was used for therapy because the more accepted drug, quinine,

was not readily available.

I give my permission to release the medical records and blood tests of my child to Dr. Terrence Stull and the Centers for Disease Control, who will analyze the information along with information from other patients. The information may later be published, but the identity of my child will remain strictly confidential.

---------- 072685 ----------
Signature of parent date

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Terrence Stull, M.D. date

8 5 2 1 5 1 9 440 /2
OSE1 AFRIYIE, JENNIFER FNCMR

253 W. HANSBERRY ST.

PHILA PA 19144

02 YR 2/8/83 ER 7/25/85

MR 425715 STULL 507590

AILIFE INS 33387/F

The Medical Colleege of Pensylvania
Hospital (215) 842 6000
October 23, 1989

Mr. Francis Osei-Afriyie

153 Royal Grant Way

Dover, DE 19901

Dear Mr. Osei-Afriyie:

Thank you for your of October 5, 1989. It raises a number of concerns, and I have been able to review these concerns with Dr. Stull, your daughters' attending physician.

As a result of this review, I am convinced that your daughters' treatment by Dr. Stull in 1985 was in every way appropriate and successful. In particular, Dr. Stull's use of quinidine seems to have been a most astute decision. That decision was made by him on his own assessment,

other expert input, and previously published information, such as The Medical Letter, 26:27-34, 1984.

The clinical outcome of this decision - that is , the successful medical therapy of your daughters' conditions- is a matter that is gratifying to us.

Nonetheless, we take your concerns about your daughters' treatment very seriously. Accordingly, this letter as well as your letter to me and addenda, will be copied to Mr. Robert Kaiser of the Center for Disease Control and to Mr. Robert Underwood of the U.S. Food and Drug Administration for their review.

I sincerely hope that Jennifer and Monica are both doing well.

Once again, I appreciate your sharing your concerns with me.

Sincerely,

/s/

William E. Welton
Executive Vice President and Chief Operating Officer

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JENNIFFER AND MONICA OSEI-AFRIYIE, minors Individually, by their parent, FRANCIS OSEI-AFRIYIE, and in His Own RIGHT,	.	CIVIL ACTION NO. 90-1566
VS.	.	
THE MEDICAL COLLEGE OF PENNSYLVANIA and TERRENCE LEE STULL, M.D.	.	

MEMO

Are any or all of plaintiffs' claims barred by the applicable Statute of Limitations?

Assault and Battery (Two year Statute of Limitations)

YES

NO

Negligence (Two year Statute of Limitations)

_____ YES

_____ NO

Lack of informed consent/wrongful discharge of confidential information (Two year Statute of Limitations)

_____ YES

_____ NO

Invasion of Privacy (One year Statute of Limitations)

_____ YES

_____ NO

Intentional infliction of emotional distress (Two year Statute of Limitations)

_____ YES

_____ NO

APPENDIX I

EXCERPT OF PETITIONER'S BRIEF

Again, the *Allen v. United States*, 527 F. Supp. 476 (D. Utah) spoke to petitioner's argument:

> However, just because a given piece of information is published in the ' *Time* ' magazine on a particular date does not compel any court to charge a whole community, or the whole world, with knowledge of the contents thereof... Beyond that the government does not seriously assert that each and every plaintiff herein has seen and read all the coverage reflected in the exhibits , or even most of it.

The legislative history on human experimentation is brilliantly summarized in *Clay v. Martin,* 509 F.2d 109 (1975), at 112-113 as follows:

> '' ... For example, the National Research Act, signed into law in July 1974, created a National Commission for the Protection of Human Subjects of Biomedical Research. The legislative history of the Act indicates that it was passed in reaction to reports of abuses similar to those alleged here... U.S. Code Cong. and Admin. News, supra, note 6, at

2168 (Sen. Rep. No. 93-381). Of particular concern to the drafters was that a subject's consent be based on full disclosure, free of any form of coercion. Id. at 2175. In view of these expressions of public policy, a court should not be quick to dismiss on pleading technicalities an action involving experimentation on humans.''